

**ASPECTS OF PUBLIC POLICY**  
**IN THE CONFLICT OF LAWS**

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## PREFACE

The regulations applicable to the Ph.D. degree require a declaration and the provision of certain information. What follows is directed at meeting these requirements.

I declare that this thesis is my own work - I composed it myself.

Three articles containing material from this thesis have been published or accepted for publication.

These are:

1. "Non-Recognition of Governments and the Conflict of Laws: The Rhodesian Situation", 1974 J.R. 127-146;
2. "The Non-Enforcement of Foreign Revenue Laws", (1976) 93 S.A.L.J. 46-55;
3. "The Repugnancy Rule in African Law and the Public Policy Rule in Conflict of Laws", to be published in Acta Juridica, probably the 1977 volume.

Publication of these articles was approved by my supervisor.

In Chapter 1 of this thesis I have referred to material from the section of my unpublished LL.M. thesis on the "repugnancy rule" (pages 10-24). Lest this be viewed as the submission of material already used for another degree, the extent of which must be clearly disclosed, I have made available to the examiners a copy of the relevant section of the LL.M. thesis.



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## I N T R O D U C T I O N

The title of this work discloses its subject-matter to be aspects of public policy in the Conflict of Laws. The seven specific topics dealt with are listed on page iii and a short summary of what is covered on each topic is provided by the abstract on pages vii and viii.

Conflict of Laws or Private International Law, its other popular name, is a branch of private law - its concern, broadly speaking, is with the rights of private individuals, the State's interest in this field generally being, as Kegel has expressed it, altruistic rather than egotistic<sup>1</sup> - the State's concern in this sphere is more in seeing that justice is done to those living or litigating within its jurisdiction than with the protection of its own direct interests. However, state interests, or the interests of society or the community, legitimately intrude to a significant extent into a number of fields of Private International Law. In such fields the approach of the courts may be said to have been substantially influenced by consideration of public policy. It is with these fields, or some of them, that this work is concerned.

As a result of the influence of public policy, rules in these fields are not always easy to understand. Some of them seem to deny justice to the parties to a dispute favouring, instead, some rather abstract or amorphous State interest. An obvious example of this is the rule denying effect to the laws of unrecognised governments which can cause undeserved hardship to individuals. Again it may not be easy to comprehend why a "taxpayer" should be able to

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1. Kegel, (1964) II Hague Recueil 183 quoted in Anton, Private International Law (1967) 33.

escape his fiscal obligations by removing himself and his assets to another country.

I have obviously not attempted, in this thesis, to deal with all the fields of Conflict of Laws in which state interests have been an important or dominant factor in the formulation of rules of law. Thus, for example, I have not dealt with sovereign immunity nor with trading with the enemy, save incidentally. However, I have dealt with a number of the more important of these topics including that perhaps the most important, the external public policy rule. Kahn-Freund has said that the external public policy principle "... is of such fundamental importance that it would be possible to write a separate book on its significance and ramifications."<sup>1</sup> With this I agree save that I doubt whether one book would suffice to deal with all aspects of this principle.

The external public policy rule itself provides a further unifying factor in respect of most of the topics treated in this work. It is the main subject of the first chapter and the rule on foreign revenue laws, that on foreign penal laws and the rule requiring the application of the lex fori in delict (tort) the topics dealt with in the second, third, fourth and sixth chapters, have all been described with some justification, if not with complete accuracy, as crystallisations of the external public policy rule. Then Chapter 5 is

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1. Kahn-Freund, General Problems of Private International Law (1976) 281.



principally concerned with the question whether laws, particularly statutory provisions, can be said to embody principles of external public policy.

I made the point earlier that there is no attempt in this work to deal with all the fields of Conflict of Laws in which state interests have been of substantial influence. I should also add that I have not tried to say my final words, let alone the last word, on any of the topics with which I have dealt - my aim has merely been to contribute something useful to the gigantic literature on the notorious difficult subject of Conflict of Laws. I am aware that this is made even more difficult by the very high standard of much of the existing literature.

I would like to thank my supervisor, Professor E.M. Clive, for his encouragement, advice and assistance and Mrs. M. Schofield and Mrs. B. Ferguson for their industry and patience in the typing of the text.

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1. Kahn-Freund, op. cit. supra, 2.

2. Morris, The Conflict of Laws (1971) 8.

## ABSTRACT OF THESIS

This thesis deals with seven topics in the general sphere of public policy and the Conflict of Laws. These all concern fields where state or community interests intrude to a substantial extent into Private International Law.

The first chapter examines the external public policy rule and its role and functions in the Conflict of Laws. Then follows, in the next two chapters, investigations of the rules on the non-enforcement of foreign revenue laws and on the non-enforcement of foreign penal laws. The fourth chapter briefly considers to what extent these two rules can be said to be derived from the external public policy rule and whether they can be generalised into a broader rule that foreign public laws will not be enforced.

The subject matter of Chapter 5 is external public policy and the field of operation of laws. The main question considered here is whether rules of law, particularly legislative rules, can be said to embody principles of external public policy and whether there is any point in having such a category of laws.

In delict (tort) Scottish and English judges will not allow a claim arising out of a foreign delict unless it is actionable by the lex fori. This is in order to protect the interests of the forum. If these judges were to abandon this requirement and were to apply the proper law in delict, what means would still be available to them to protect these interests? The sixth chapter is concerned with /

with the answer to this question.

In the last chapter the problem of the laws of unrecognised governments is considered. Here again important state interests are involved. There have been significant developments in this field in recent years, mainly as a result of the Rhodesian U.D.I., and these developments are reviewed in this chapter.



## CHAPTER 1

PUBLIC POLICY IN THE CONFLICT OF LAWS with special reference to the functions of the external public policy rule.<sup>1</sup>

Meanings of the expression and their relevance to Conflict of Laws.

Usually when it is said that a matter involves public policy this means that it concerns the public interest and "public" here means "relating to the state or to the community". However the term "public policy" has more than one meaning in law and this can cause confusion. For example, the law of the forum uses two significantly different concepts of public policy, that applied where the apposite legal system in a case is the lex fori and that used where the lex causae is a foreign system. These two concepts are distinct and it is unfortunate that they are not given different appellations. For present purposes they may be designated internal public policy and external public policy. It is this second type of public policy which is of particular relevance in conflict of law situations. Stated in general terms and somewhat crudely,

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1. The textbooks on Conflict of Laws deal with this topic and, in addition, the following articles are of particular relevance: Holder, (1968) 17 J.C.L.Q. 926; Nygh, (1964) 13 LC.L.Q. 39; Paulsen and Sovern, (1956) 56 Col.L.R. 969; Katzenbach, (1956), 65 Yale L.J. 1087; Kahn-Freund, (1954) 39 Tr. Grotius Soc. 39; Nussbaum (1939) 49 Yale L.J. 1027. See also, Lloyd, Public Policy, A Comparative Study in English and French Law (1953). Of particular interest is his exposition in chapter V of the French approach to external public policy. It is said that the external public policy rule is used more frequently by continental judges than by English and American judges. On this see Nussbaum, op.cit. supra, 1029 and 1039 and Kahn-Freund, op.cit. supra, 42 et seq. On public policy in the U.S.S.R. see Garnefsky, Public Policy in Soviet Private International Law (2nd ed., 1970).



this external public policy rule operates, where a foreign legal system is indicated by the choice of law rules of the forum as governing an issue, to deny effect to any applicable law of that system which is repugnant to the fundamental policy of our law in cases with foreign elements. In Scots law and English law external public policy is a common law concept in origin but it is used in legislation too. Thus, for example, section 8 of the Recognition of Divorces and Legal Separations Act 1971 provides, *inter alia*, that an overseas divorce may be denied recognition if "its recognition would manifestly be contrary to public policy".<sup>1</sup> Here the external public policy provision probably has its common law meaning but the provision, when it appears in legislation or international conventions, obviously need not have that meaning. The term is used in the E.E.C. Convention on Jurisdiction and Judgments in Civil and Commercial Matters<sup>2</sup> which is likely, in the near future, to be given legal effect, in the United Kingdom, by legislation. The meaning given to the term in this context may well not be identical to that which it has under the common law and, of relevance here, is the fact that interpretation of the provisions of the convention

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1. The need to provide for this exception in legislation was overlooked in relation to s.5(4)(f) of the Marriage (Scotland) Act 1977.

2. Article 27.

is a task for the European Court.<sup>1</sup>

The term 'public policy' is also used in Article 48 of the E.E.C. Treaty. This article provides for freedom of movement and employment within the member states of the Community. However, under this provision, member states are allowed to impose limitations justified on grounds of public policy, public security or public health. There is no reason why 'public policy' in this context should be given the same meaning as it bears in the E.E.C. convention mentioned above; the different contexts may justify different meanings. From the cases decided on Article 48 by the European Court Lord Mackenzie Stuart concludes: "The trend in these cases is quite clear. From being purely national concepts, by the successive intervention of the Council, the Commission and the European Court, there are gradually being developed Community concepts of public policy and public employment."<sup>2</sup> This statement must, of course, be read in its context. It is not a proposition of general validity. However, the growth of a general concept of Community public policy is an intriguing if unlikely possibility. No doubt it is possible in a

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1. For illustrations of this see Lufttransportunternehmen GmbH & Co. K.G. v. Eurocontrol, (case 29/76); [1976] E.C.R. 1541; [1977] 1 C.M.L.R. 88; Handelskwekerij G.J. Bier B.V. and Stichting Reinwater v. Mines de Potasse d'Alsace S.A., (case 21/76); [1976] E.C.R. 1735; [1977] 1 C.M.L.R. 284.

2. 1976 J.L.S. 40.

federation for there to be a federal public policy as well as distinct state concepts of public policy.

The public policy rules of a foreign lex causae can also be relevant in a conflicts case. Thus, for instance, a contract may be void because it is contrary to the internal public policy of the foreign proper law. Indeed in this field of contract and, no doubt, in others, the internal public policy doctrines of two separate foreign systems may be involved. Thus, if parties specifically select a proper law in their contract, then the contract will not be valid if it is rendered illegal and void by that system, either because it is contrary to a mandatory provision of that system or because it falls foul of that systems doctrine of internal public policy. But even where such a contract is valid by the selected proper law, it may be void for illegality if it offends against some mandatory provision of the proper law, objectively ascertained, or against the internal public policy of that system.<sup>1</sup>

#### The sphere of operation of the rule

The proper sphere of operation of the external public policy rule is difficult to discover and this is aggravated by the fact that, in some

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1. Dicey and Morris, The Conflict of Laws (9th ed., 1973) 778-779 and North, Cheshire's Private International Law (9th ed., 1974) 207. But see Anton, Private International Law (1967) 192.



cases, the exact relevance to the decision of the references to public policy in the judgment is not clear.<sup>1</sup> Then, as public policy is a matter of law, not fact, no evidence is led on this matter.<sup>2</sup>

This problem is further exacerbated by "the subtle emergence of what might be called public policy considerations in other forms".<sup>3</sup> Choice of law rules that refer matters to the *lex fori*, such as the rule that procedural matters are governed by the *lex fori*, protect the interests of the forum and render unnecessary the operation of the external public policy rule within their spheres. Then certain choice of law rules are, Holder and others claim, "judicially created substitutes for public policy".<sup>4</sup> "Among these substitutes and crystallising into

1. Holder, op. cit. supra, 928.

2. "The legal machinery is at present inadequate it seems, for both proof of the general norm and content of public policy and also the impact of a particular decision on that policy. Being treated as a question of law not fact, no proof is offered. The option, then, has been made to trust the variable environmental and predispositional qualities of the judge rather than demand from the court an honest attempt at articulation of the public policy that is offended and how" - Holder, op. cit. supra, at 952.

3. Holder, op. cit. supra, 929.

4. Holder, at 929.

concrete rules would be included: non-recognition of penal and revenue laws, the determinate effect of diplomatic recognition and technical rules controlling the recognition of foreign marital status."<sup>1</sup> A court may be more willing to use one of these legal rules to protect public policy interests rather than bluntly to invoke the public policy rule.<sup>2</sup>

Other features of the operation of the external public policy rule add to the difficulties of ascertaining its proper sphere of operation. For instance, the external public policy rule performs a number of separate functions. Then, whether or not the rule is applied is influenced by the number of contacts the case has with the country of the forum - "the doctrine of relativity according to contacts, as distinguished from the comparatively less important relativity of public policy in space and time which latter simply means that views on public policy change with territories and epochs."<sup>3</sup> Both these features are discussed later in this chapter.

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1. Holder, at 929. See also Kahn Freund, op. cit. supra, 45-59, and Holder, at 949. This crystallisation can lead to a loss of flexibility and the application of the new rule in inappropriate circumstances. On crystallisation see too this chapter at p.31 and also chapter 6 at p. 137.
  2. Holder, at 929.
  3. Nussbaum, op. cit. supra, 1031.

### The external public policy rule and the repugnancy rule

There is a rule rather similar to the external public policy rule found in Anglophonic Africa which dates from colonial times. This African rule is of interest because it is sufficiently close in nature to the external public policy rule for their comparison to be of value. In these African states there is an imported western type legal system but, in addition, one or more customary system, and often islamic law, are also recognised. A customary system is applied in its designated sphere subject to certain limitations, one being, to use the Southern Rhodesian formulation, that the applicable rule of customary law must not be "repugnant to natural justice or morality."<sup>1</sup> There is considerable variation from country to country in the wording of this repugnancy rule but the idea behind the rule remains the same.<sup>2</sup> The main function of this rule is to prevent the application of customary laws repugnant in

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1. The African Law and Tribal Courts Act of 1969, s.2.

2. For examples of the various formulations see Allott, New Essays in African Law (1970) 158. "It is submitted that the differences in wording are irrelevant and have not influenced the behaviour of the judges" - Allott, Essays in African Law (1962) 197. My knowledge of the repugnancy rule is confined mainly to its operation in Southern Rhodesia and it is from that country's legal system that I have taken most of my examples. I have used in this chapter some material from my unpublished thesis "The Recognition of Tribal Law in Southern Rhodesia" submitted in 1963 for the degree of LL.M. at the University of Cape Town (supervisor: Professor H.J. Simons). This work will be referred to in this chapter as "the thesis".

Some material on the repugnancy rule in Southern Rhodesia may be found in Goldin and Gelfand, African Law and Custom in Rhodesia (1975) Chapter 7.



their nature. It excludes laws that "inherently impress us with some abhorrence or are obviously immoral in their incidence"<sup>1</sup> or so outrage "accepted standards of ethics as to create a sense of revulsion."<sup>2</sup> A more recent and perhaps better formulation suggests that the law held repugnant must be "essentially below the minimum standard of civilised values in the contemporary world."<sup>3</sup> Thus the Matabele law of slavery will not be enforced.<sup>4</sup> Again the rule, or alleged rule, of Shona law which denies a wife a divorce on the ground of the husband's impotence also falls foul of the repugnancy rule.<sup>5</sup> But the rule of Shona tribal law that a father is not responsible for the support of his illegitimate child is not repugnant to natural justice or morality, for the child is not left destitute; its mother's family is responsible for its support.<sup>6</sup>

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1. Tabitha Chiduku v. Chidano, 1922 S.R. 55 at 56.
  2. Matiyenga and Mamire v. Chinamura and Others, 1958 S.R.N. 553; 1928-1962 S.R.N. 829.
  3. T.O. Elias, British Colonial Law (1962) 104.
  4. Mabigwa v. Matibini, 1946 S.R.N. 117; 1928-1962 S.R.N. 360.
  5. Chawa v. Bvuta, 1928 S.R. 98.  
There was apparently thought to be no provision for nullity for impotence under customary law either.
  6. In re Robert, 1953 S.R. 47 at 50 (Thesis, 15).



A close analogy can here be observed with the external public policy rule operative in the international private law sphere.<sup>1</sup> Both are used to exclude immoral laws. However the external public policy rule also has the function of protecting important state interests.<sup>2</sup> But it does not seem that the repugnancy rule is used in this way. This is, no doubt, because it operates internally and not in the international dimension.

It will be seen from its formulation that the repugnancy rule is specifically aimed at laws repugnant to natural justice and, no doubt, such laws would also fall foul of the external public policy rule. In the international sphere, however, it is foreign decrees rather than foreign laws that are likely to offend, and, in this context, a separate rule, requiring that such decrees be not contrary to natural justice, has developed.

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1. A sound and much quoted formulation of the external public policy rule by Cardozo, J. is as follows:  
 "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." - Loucks v. Standard Oil Co., 224 N.Y. 99 at 111, 120 N.E. 198 at 202 (1918) quoted in Dicey and Morris, at 70. This is a reasonably sound description but more emphasis is needed of the "state interest" aspect of public policy. On this see North, at 153.
  2. Examples are given in the next section of this chapter and see too, Regazzoni v. K.C. Sethia (1944) Ltd., [1958] A.C. 301 at 318-9 where Viscount Simonds states that it is contrary to external public policy "to enforce or to award damages for the breach of a contract which involves violation of foreign law on foreign soil." His Lordship had stated earlier, on 318, "When I say "foreign country" I mean a foreign and friendly country and will not repeat the phrase."
  3. See Dicey and Morris, Rules 187 and 188(1).

The interests protected by the external public policy rule

That different types of interests are protected by the external public policy rule<sup>1</sup> means that there can be a conflict of such interests. The rule that requires the non-recognition of foreign revenue laws is said to be based on external public policy. The proposition here is that, if the courts were to enforce foreign revenue laws, some would have to be refused enforcement as being contrary to external public policy. But to declare the revenue laws of another state contrary to external public policy may itself be contrary to that policy. For example, a foreign revenue law may be immoral, discriminatory or oppressive and thus contrary to external public policy, but to declare it to be so may seriously damage relations between the foreign government and ours, or so the argument goes, and this too could be contrary to external public policy. The answer suggested by those who put forward this argument is to refuse to recognise all foreign revenue laws rather than to risk the offence to foreign states which recognition subject to

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1. Attempts have been made to formulate categories of external public policy, (See, e.g., North, 152-4; Nygh, 46-9), but only limited success can be claimed for these attempts. Not only are the categories described in very wide and rather vague terms but these efforts at categorising overlook the fact that the categories are not relevant to all the uses of the external public policy rule. A later section of this chapter is concerned with these uses.

external public policy could entail.<sup>1</sup>

Even if one only considers state interests in this field of external public policy there can be conflict. Thus a foreign country's exchange control laws may be contrary to our country's interests to an extent that would suggest that they should be declared contrary to external public policy. However, against this must be set the possible consequences of such a designation. It may disrupt relations with the foreign state and lead to retaliation. Thus it may be thought wise by the courts to refuse to invoke the external public policy rule in such cases leaving it to the government to attend to the matter, perhaps by international convention or local legislation or both. After all, what methods do the judges have of ascertaining and assessing state interests? This fear of judges that they may do harm by intruding into the political sphere finds illustration too in the field of foreign expropriatory legislation. Such legislation is generally allowed effect within, but denied force outside, the territory of the enacting power, but the better view is that the external public policy rule operates in respect of the internal effect of the expropriatory law within its own

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1. All this is discussed at some length in the chapter of this work dealing with foreign revenue laws.



country. Some deny this limitation on the ground that such use of the external public policy rule could have undesirable international repercussions. This matter has been considered again recently in the House of Lords in Oppenheim v. Cattermole<sup>1</sup> in the particular context of discriminatory legislation of a foreign country depriving some of its citizens of their nationality.

#### Dangers in the use of the external public policy rule

The point has often been made that the courts should be slow to designate some rule of foreign law contrary to external public policy.<sup>2</sup> There is a real danger here of parochialism and of not appreciating the real role of the foreign rule in its own system and community.<sup>3</sup> This too has been the experience with the repugnancy rule. Indeed some foreign or customary rules designated as offending against these exclusory rules have subsequently been found to be the same as the rule of the lex fori, or the imported system, on the same matter.

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1. [1976] A.C. 249, H.L.

2. See, for example, Holden, 928 and Paulsen and Sovern, 970-971.

3. "An English court will refuse to apply a law which outrages its sense of justice or decency. But before it exercises such power it must consider the relevant law as a whole". - Scarman, J., In re the Estate of Fuld (No. 3), [1968] P 674 at 698, quoted in Dicey and Morris, at 70.

Thus in one Rhodesian case the rule of customary law that allowed a husband who had condoned his wife's adultery to sue the other man for damages was held to be contrary to the repugnancy rule.<sup>1</sup> Not long afterwards it was held that the common law also permitted an action in these circumstances.<sup>2</sup> This is reminiscent of the English case of Kaufman v. Gerson<sup>3</sup> in which it was ruled contrary to morality to enforce a French contract because agreement had been obtained by duress. It has subsequently been argued, for example in Dicey and Morris,<sup>4</sup> that the conduct complained of did not amount to duress under English law.<sup>5</sup>

1. R. v. Mchenkji and Charewi, 1917 S.R. 69. The reasoning of the judge in this case reads as follows:  
 "Here, under the aegis of the law, or by native custom, it seems that the husband can have damages without a divorce. It is only human, though it may be degraded humanity, that the husband then discovers his "wife" to be a money-making commodity - and keeps her as such.  
 In view of that I have constantly and strenuously refused to sanction the giving of damages alone without also dissolving the marriage, even though it may be in accordance with native law and custom, for such custom I hold to be repugnant to natural justice and morality. I have, of course, excepted those cases where the woman has not consented, ..... But, generally speaking, where the husband does not desire to be quit of his wife, he should have no damages, because he has suffered none. If he wants damages, the marriage must be dissolved; otherwise he would be given an almost irresistible opportunity of making money in the most dispicable and degrading manner imaginable." - Beaufort, Acting J., at 71 and 72. (Thesis, 16-17) This case was not followed in subsequent cases.
2. Viviers v. Kilian, 1927 A.D. 449. (Thesis, 16).
3. [1904] 1 K.B. 591.
4. Dicey and Morris, at 760-1.
5. For other suspect applications of the external public policy rule see Kahn-Freund, General Problems of Private International Law (1976) at 282. In this chapter this work will be referred to as "Kahn-Freund, General Problems" to distinguish it from the article by Professor Kahn-Freund cited in the first footnote of this chapter.

The relationship between internal private law and external public policy

What is the relationship between the external public policy rule and the internal laws of the system? Obviously, the mere fact that a foreign rule is different to the domestic rule will not render the former contrary to external public policy.<sup>1</sup> - nor will a foreign rule automatically escape being designated contrary to external public policy because the forum has an identical or similar rule.<sup>2</sup> Then it may even be that the application of the lex fori may, in certain circumstances, be contrary to external public policy.<sup>3</sup> Some writers, notably Savigny,<sup>4</sup> have suggested that there are two types of internal rule, those that could give way to a foreign rule and those that for reasons of public policy, could not. This analysis is relevant at the stage of deciding which system is the lex causae, but it is not relevant to the problems here

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1. Kahn-Freund, op. cit. supra, 41.
  2. "A foreign law may run counter to the public policy of the forum, albeit the forum possesses a similar law. Thus the Hoge Raad of the Netherlands, for reasons of public policy, has denied recognition to Canadian gold clause abrogation even though the Netherlands herself had, at that time, abrogated gold clauses". - Nussbaum, at 1047.
  3. See, for example, Regazzoni v. K.C. Sethia (1944) Ltd., [1958] A.C. 301.
  4. Savigny (transl. by Guthrie), A Treatise on the Conflict of Laws (2nd ed., 1890) 76-85. See too, Kahn-Freund, at 41-42.



being considered, that is, whether a foreign law designated by our choice of law rules as the *lex causae* should be denied application as being contrary to external public policy. By this latter stage the potentially applicable local law has already been declared to be inapplicable, the question that remains is merely what degree of deviance from the local rule by the selected foreign one is tolerable. In our system the age of marriage is 16 but how young may a foreign system permit the bride to be before affronting our external public policy rule? Fourteen? Twelve? Or ten?<sup>1</sup> This rule of our system may be said to have a fairly wide zone of tolerable deviation. If the foreign law falls within the zone, it is not contrary to external public policy, but if it falls without, it does so offend. This zone extends also in the other direction here though not necessarily to the same extent. Thus, in the interests of freedom to marry, would the external public policy rule be offended by a foreign rule requiring the bride to be 18 years of age? What about 20? In the case of some internal rules, for example, those relating to force and fear (duress), the zone of tolerable deviation may be very narrow or totally absent.<sup>2</sup> No such zones of general application can be

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1. The marriage in Nigeria of a girl domiciled there who was only 13 years old was recognised as valid in *Mohamed v. Knott*, [1969] 1 Q.B. 1. Girls could, of course, marry in England (and Scotland) at 12 until the age was raised to 16 by legislation of 1929.

2. Kahn-Freund, at 40.



postulated nor can any simple classification of internal rules be made on this basis.

Also relevant there is the "contacts" approach to the application of the external public policy rule. This will be dealt with later, but the basic idea of this approach, crudely stated, is that the more links a case governed by foreign law has with the forum, the more likely is the court to use the external public policy rule. This would mean that, where there is a zone of tolerable deviation, it contracts as the total weight of the links with the forum increase and expands as these connections decrease in total weight. Thus the rule on the age of marriage may be said to be surrounded by a zone of tolerable deviation of elastic dimensions! One should perhaps also make the point that it is not enough, for the suspect foreign law to be denied effect, that it fell outwith the zone of tolerable deviation; the effect of its application in the case in question must be contrary to public policy. This point is elaborated later in this chapter.

#### Public policy in internal law and the external public policy rule

The sphere of operation of the public policy doctrine in internal law is very limited. It is used principally by the courts to render void certain agreements, purported testamentary dispositions and other allegedly valid juristic acts which are objectionable but not contrary to any specific rule of law. In theory it provides the courts with a

valuable tool, but its use is very limited in practice. Judges are reluctant to make use of it. This is especially so where there is no direct precedent for its use in the particular circumstances of the case in question. Then there is a tendency for repeated applications of the doctrine in a particular context to result in the development of a new rule of law; particular applications crystallise into a specific law. The position as regards the external public policy rule is rather different. Here too there is a reluctance on the part of the judges to use this weapon,<sup>1</sup> and crystallisation, or something similar to it, is said to occur,<sup>2</sup> but it is clear that this latter rule has a very wide sphere of potential operation; all relevant rules of all foreign systems applied in the forum must pass its tests, though it may be that only rarely a foreign law offends.

In another sense, the external doctrine can be said to be narrower

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1. Nussbaum, at 1037 and 1046, discusses this reluctance at some length. Factors like the vagueness of the concept, difficulties of ascertainment and the concepts extra-legal nature, no doubt, contribute to this reluctance to ride the "unruly horse" but Nussbaum sees the decisive factor as being the liberal tradition of the common law courts. Thus: "Liberalism postulates international-mindedness favourable to the recognition of foreign law; but also, in accord with the doctrine of the division of powers, it strives to keep courts clear of politics; and there is an element of foreign politics in the conflicts - use of public policy." - at 1048-9.
  2. See this chapter at p.5.

than the internal. This is shown by the answer to the question:

Will an agreement governed by a foreign law that would, if local, be contrary to internal public policy, automatically fall foul of the external public policy rule? The relevant cases suggest that it would not, and this seems right in theory in view of the different contexts in which the two public policy rules operate.<sup>1</sup> A case often cited in this connection is Addison v. Brown<sup>2</sup> in which it was said that, although an English agreement to exclude the jurisdiction of the English courts would be contrary to internal public policy, a similar foreign agreement excluding the jurisdiction of foreign courts need not be contrary to English external public policy. This type of approach was also recognised as valid in Timms v. Nicol<sup>3</sup> where Goldin, J. said, "I do not overlook the fact that cases exist in which the Courts have not applied their ideas of public policy to foreign contracts."<sup>4</sup>

Public policy and the determination of the proper scope of laws

As has been pointed out by Nussbaum,<sup>5</sup> public policy considerations

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1. See Kahn-Freund, op. cit. supra, 41-2.

2. [1954] 2 All E.R. 213.

3. 1968 (1) S.A. 299 (R).

4. At 300.

5. (1939) 49 Yale L.J. 1027.



may be very relevant when the scope of application of a law, particularly an enacted law, is being determined. Timms v. Nicol, mentioned in the last section, provides an example of this. In that case the plaintiff sued the defendant in Southern Rhodesia for gambling debts valid under Zambian Law, their proper law. It was, however, held that the proper law had to give way to the mandatory provisions of the lex fori. The relevant provision of the lex fori, the rule of Roman Dutch Law that gambling debts are not recoverable, was "of an overriding nature" and was "based on principles of public policy". It was, therefore "applicable in all actions".<sup>1</sup>

One must distinguish two rules that limit the application of a selected foreign lex causae. The one is to the effect that such a foreign system's provisions must give way to an applicable mandatory rule of the lex fori. In determining the scope of a rule of the lex fori, public policy considerations may be relevant. The second rule requires that a foreign law be not enforced if it is contrary to the

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1. Timms v. Nicol, at 300. It is interesting to note that there was an alternative ground of decision in this case. It was that gambling debts are rendered unenforceable by Roman Dutch law and this being a procedural rule is applicable to all such claims brought in Southern Rhodesia whatever their proper laws. The point was made too that systems with similar rules on gambling debts may characterise them rather differently and Dicey and Morris, (7th ed., 1958) at 760, was referred to in this context. See too, Clayton v. Clayton, 1937 S.C. 619.

external public policy of the forum. These two rules are quite distinct<sup>1</sup> and Timms v. Nicol is an example of the application of the first, not the second. On the other hand, it may be that legislation is based on public policy considerations strong enough to prevail over an inconsistent foreign rule. In such a situation, the foreign rule may be denied application even though the municipal enactment is not directly applicable on the grounds that the foreign rule is contrary to the important public policy considerations of which the municipal enactment is a particular expression. This is all discussed more fully in the chapter on public policy and the scope of laws of statutes.

Policy evaluation approaches adopted to solve conflict of laws problems in the United States of America can be and have been confused with applications of the external public policy rule. To examine the policies behind the relevant rules of competing systems in an attempt to solve an apparent conflict between them in order to decide which system to apply, is a very different process from that of enquiring, once the foreign *lex causae* has been selected, whether its relevant provisions should not be applied as being contrary to the external public policy of the forum. A cause of this confusion is that, the first process, the ascertainment of the field of operation of the potentially relevant internal rules of the lex fori, may involve the assessment of public policy considerations.

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1. They are sometimes confused. See, for example, Kahn-Freund, General Problems, 281.

The various uses of the external public policy rule

Despite doubts about the proper limits of the external public policy rule and other criticisms, also a certain reluctance by judges to use it, predictions that it would decline in use have not proved true.<sup>1</sup> It remains a useful and flexible weapon in the judicial armoury. Indeed, a number of different functions of the public policy rule have been distinguished. Holder,<sup>2</sup> listing uses described in earlier writings, sets out three "converging functions." The first function is that of preventing the application of foreign laws repugnant in their nature. An example of such a law would be one creating an incapacity to marry on religious or racial grounds. The repugnancy rule, as already noted, operates in the same way. This function of the external public policy rule may be positive in effect as where a marriage prohibited by

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1. Holder, op. cit. supra, 928, commented in 1968 that these predictions had not come true and added:

"Nor can it be ignored that the flourish to independence of the new States has introduced a dynamic element into the international legal order which will be reflected in the private international law systems. It may be, therefore, that the machinations of private international law may no longer claim the universal acceptance of Western values. Consequently, it is predictable that there may be an enlarged demand for the employment of the strictures of public policy in that 'Revolutionary and destructive legislative inroads into national and international economics have shifted the focus of public policy to the conflicts area'. There is, in addition, a secondary and complementary influence, in that the new States display increasing demands to legislate and have enforced in appropriate circumstances their policies relating to events, people and resources - demands which are subject to the normal international pressures." (The internal quotation is from Nussbaum, op. cit. supra, 1038).

2. Holder, 949. See too Paulsen and Sovern, op. cit. supra, 972-980.



the domiciliary law is permitted, or negative as where a contract, valid under its proper law, is rendered void because it falls foul of the external public policy rule. This is again true of the repugnancy rule too.

Another use of the external public policy rule is to prevent injustice in a particular case. Here it operates as a reserve equity principle.<sup>1</sup> Holder says: "In practice, public policy has a second function, to prevent injustice in the circumstances of the particular case before the court. The concept provides protection not from an especially repugnant foreign law, but rather from its harsh application."<sup>2</sup> It is not here so much the rule of foreign law that is objectionable but the consequences of its application in the particular case before the court that are unacceptable. Holder gives no specific example but considers that several matrimonial status cases like Gray v. Formosa<sup>3</sup> illustrate this use.<sup>4</sup> His approach here, no doubt, is that the rule of

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1. There has been much discussion and criticism of this use of the external public policy rule as a reserve equity principle. See, for example, North, op. cit. supra, 154-9; Dicey and Morris, op. cit. supra, 74-5; Nygh, op. cit. supra, 39; Paulsen and Sovern, op. cit. supra, 1008-1010.
  2. Holder, 949. See too Paulsen and Sovern, 1008-1010 and Kahn-Freund, 43.
  3. [1963] 2 259 at 268-9.
  4. Holder, 945, 949-50.



Maltese law that a Catholic may only marry in a Catholic church is not objectionable when applied to Catholics, domiciled in Malta, who marry there, but that it is offensive when applied to invalidate the registry office marriage in England of a Catholic of Maltese nationality and a non-Catholic English woman both domiciled in England.<sup>1</sup>

The repugnancy rule too is capable of operating as a reserve equity principle. This is well illustrated by the case of Vela v. Mandinika and Magutsa.<sup>2</sup> Here it was held that, although it is a rule of Shona law that a husband may refuse to accept payments from the natural father of his wife's adulterine children which payment would, if accepted, give the natural father the right to the guardianship and custody of the children, in the circumstances of the particular case,

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1. In this case the offending Maltese rule came before the English court indirectly - what was in question was the recognition of the Maltese nullity decree. If the Maltese rule had come up directly in an English case - for instance, if a Maltese Catholic had sought to marry in England other than in a Catholic church and the question of his capacity to do so had been raised - two weapons other than the external public policy rule would have been available to the English court. The Maltese rule could have been characterised as one relating to formalities and thus only applicable where Maltese law was the *lex loci celebrationis*, or, alternatively, the dubious choice of law rule applied in cases such as Chetti v. Chetti, [1909] P 67 and discussed later in this chapter (at p.28 ) could, perhaps, have been used to render the foreign incapacity inoperative provided the other spouse was domiciled in England.
  2. 1936 S.R. 171. Other cases also illustrating this function of the repugnancy rule are: Namtunga Rabison v. Matipedza and Madzima, 1953 S.R.N. 397; 1928-62 S.R.N. 697; Dayimano v. Kgaribiatse, 1931 S.R. 134.

"... the husband would be acting contrary to natural justice if he refused reasonable payment of cattle or otherwise..." by the natural father. The relevant circumstances were that the wife had, some ten years earlier, deserted her husband and had since lived with the other man. It was during her cohabitation with the latter that the children were conceived and born.

We have been considering the equitable use of the external public policy rule where it is not a rule of foreign law that is objectionable but its particular application which offends. There is, however, a related situation where the rule itself offends but this is overlooked because the result of a particular application of the rule is not objectionable. Take the situation where a girl aged 9 and living in a foreign country, marries. This is permitted by the relevant foreign systems. Although a rule allowing this may be contrary to external public policy, our courts may still be prepared to recognise the marriage in certain contexts, for example, for succession purposes. Likewise polygamous marriages, though for long not recognised as marriages for purposes of matrimonial relief, were recognised as valid in the fields of legitimacy and succession. This must lead us to a re-assessment of the first use of the external public policy rule discussed above. That the rule of foreign law is contrary to external public policy in the abstract is not enough, the question is, does its application in

the particular circumstances of this case offend external public policy?<sup>1</sup> A foreign law states that girls may marry at 9 but the girl in question is 16. Here the law is objectionable, but the result of its application to the particular case is not; that a girl aged 16 may marry does not offend external public policy. Some may argue that the applicable foreign law in this case is that girls of 16 may marry. However, that is not the rule but an inference drawn from it.

A further related point arises. It can be illustrated by the situation where a foreign system does not have rules in the field of marriage providing for nullity or dissolution where there is impotence and this is considered contrary to the forum's external public policy. Here it is not a rule that offends but the absence of one. To say that a system does not provide for nullity or dissolution of marriage for impotence is not to state a rule of law but to draw an inference on what does not render a marriage a nullity or dissoluble from the rules stating what does. Again, one would assume that in this situation, the actual result of the absence of the rule on the case in question must also be contrary to external public policy.

The third use of the external public policy rule listed by Holder<sup>2</sup> is to act as a corrective to defective choice of law rules invoking, in

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1. Dicey and Morris, 71

; Kahn-Freund, General Problems, 282.

2. Holder, 950.



the view of the court, the incorrect system. The rule is usually applied in this way to enable the court to apply its own law.<sup>1</sup> This use is suspect as the real cure for defective choice of law rules is their modification or replacement, not their evasion.

This use is described by its main exponents, Paulsen and Sovern, in the following terms: "... "public policy" is one way to avoid the application of a choice of law rule which the forum wishes to avoid. The objection of the forum, thus, is not to the content of the foreign law but to its own choice of law rule. Rather than to change or modify the supposedly applicable rule the court may refuse on public policy grounds to apply the law to which the rule makes reference. The closer the tie between the forum and the facts of a given transaction the more readily we may expect the forum to use its own law to judge the matter before it. In such a view the "public policy" doctrine becomes a kind of choice of law principle, imprecise, uncertain of application, but nevertheless discharging a choice of law function."<sup>2</sup>

Iden v. Philemon (1918)<sup>3</sup> provides a rare example of the repugnancy rule acting in this role as a corrective to defective "choice of law" rules. Here the judge considered that he was enjoined by law to apply

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1. Paulsen and Sovern, 980.

2. Ibid., 981.

3. 1918 S.R. 140.

customary law to a claim before him - one arising out of adultery in respect of a marriage by civil rites - though he felt that the common law should, in justice, be applied to the parties. He overcame this difficulty by holding that, where an African had contracted a marriage by civil rites, it would be repugnant to natural justice or morality to apply customary law inconsistent with such a marriage. Consequently he applied the common law.<sup>1</sup>

It has already been mentioned that this third application of the external public policy rule is used principally to invoke the lex fori.<sup>2</sup> Not infrequently a choice of law rule indicates a foreign system as applicable where there are significant links between the case and the country of the forum. In these circumstances, it has been suggested that the court is more likely to use the external public policy rule than where there are no significant links with the forum. This, as mentioned earlier, is the 'contacts' approach<sup>3</sup> to the use of the external public

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1. The particular point in issue here was whether a husband could sue for adultery without divorcing the wife. This was possible under customary law but it was thought not to be possible under the common law, the system here applied. In this case the approach adopted in R. v. Mchenji and Chagwi, discussed earlier in this chapter at p.13 was not followed.
  2. It may occasionally be used to prevent the operation of the lex fori. See, for example, Regazzoni v. K.C. Sethia (1944) Ltd., [1958] A.C. 301.
  3. On this approach see: Nussbaum, op. cit. supra, 1030-2; Holder, op. cit. supra, 951; Kahn-Freund, op. cit. supra, 57-9.

policy rule and it is relevant to all the uses of the rule so far considered. The relevance of this approach to the third use, that of correcting defective choice of law rules, will now be briefly investigated.

A choice of law rule of the lex fori indicates the system to govern a particular matter which is thought to be appropriate to that matter by the lex fori. The system is thought appropriate because the matter in dispute is closely linked in some way with that system or its country. Sometimes a centre of gravity approach is adopted, all significant links with the competing systems are listed and evaluated in order to ascertain the most closely connected system, but in other cases one link is considered to predominate and, by itself, to indicate the appropriate system. The objective proper law approach in contract illustrates the first approach, the application of the lex loci delicti to matters within delict (tort) illustrates the second. Where a foreign lex causae is indicated by our choice of law rule there may be sufficient links, nonetheless, with the forum or the lex fori or perhaps with some other country or its law to induce the court to depart from the application of the otherwise relevant choice of law rule. These contacts may bring the case within an exception to the general rule. Thus there is authority in both Scots and English law for the proposition that an incapacity to marry imposed by a foreign domiciliary law, and thus usually given effect by the forum, will be ignored if the incapacity is unknown to the lex fori, the other party to the marriage is domiciled



in the country of the forum and the marriage is to be celebrated in that country.<sup>1</sup> In other cases where reform is required by the replacement of the existing rule or by its modification by the recognition of an exception or in some other way, the court may do none of these. Instead, it may try to solve the immediate problem facing it by using the external public policy rule to reach an acceptable solution. This is the approach criticised by Paulsen and Sovern. Then, finally, there is the situation where the choice of law rule is satisfactory and requires neither replacement nor modification but the court feels that it should not be applied in the particular circumstances of the case in question. Here the external public policy rule has another equitable use. But here it is not being used to grant equitable relief from a foreign law but from a choice of law rule of the forum.

An example is provided by Lorentzen v. Lydden & Co.<sup>2</sup> The relevant facts are that the Norwegian government attempted in May 1940

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1. MacDougall v. Chitnavis, 1937 S.C. 390; Sottomayor v. De Barros (No. 2), (1879) 5 P.D. 94; Chetti v. Chetti, [1909] P.67; Anton, op. cit. supra, 280-1; Dicey and Morris, op. cit. supra, Rule 34 Exception 3; Clive and Wilson, The Law of Husband and Wife in Scotland (1974) 162-3. This rule is discussed by Kahn-Freund, op. cit. supra, at 48-9 and 53-9. He sees it as an example of "the premature crystallisation of decisions based on public policy into independent rules which, in the process, lose their connection with the flexible idea of public policy in which they originated" - Kahn-Freund, at 45.

2. [1942] 2 K.B. 202.

to requisition by decree certain ships, including some still under construction, and claims relating to such ships. It was questioned whether this decree could be given extra-territorial effect the general rule being that ownership of property is governed by the lex situs. Such effect was allowed this law on the following grounds:

"It seems to me that the English courts are entitled to take into consideration the following matters: that this is not a confiscatory decree ..., that England and Norway are engaged together in a desperate war for their existence, and that public policy demands that effect should be given to this decree. To suggest that the English courts have no power to give effect to a decree making over to the Norwegian Government ships under construction in this country seems to me to be almost shocking."<sup>1</sup>

The case did not in fact involve a ship under construction but the right to enforce a claim for breach of a charterparty allegedly requisitioned by the same decree, and it is in this context that the above quotation must be viewed. It can be argued that the general validity of the choice of law rule that matters of ownership and its transfer are governed by the lex situs is not being challenged here but that a departure from this rule, based on the particular

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1. At 215-6.

circumstances of the case, is being justified basically on public policy grounds.

It may not be easy for a judge to decide whether, in the circumstances of the case then before him, he should invoke the law or use the external public policy rule to solve a problem. Thus where the performance of a contract involves the commission of acts in a friendly ~~overseas~~ country illegal by the law of that country, should the contract be rendered void by the external public policy rule, or should the court propound and enforce a conflicts rule that a contract is void if its performance is illegal by the lex loci solutionis?<sup>1</sup> Here again too, we have the problem of crystallisation.

To summarise: This analysis of the contacts approach to Holder's third use of the external public policy rule suggests that there is a fourth use; the rule may operate as a reserve equity principle not only in respect of generally acceptable rules of foreign law but also in connection with the choice of law rules of the forum. In the case of the third use, the external public policy rule is used where the choice of law rule of the forum is defective and requires replacement, amendment or qualification by exception, but the fourth

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1. On this see Regazzoni v. K.C. Sethia (1944) Ltd., [1958] A.C. 301. It is interesting to note that in this case the operation of the external public policy rule excluded the operation of the lex fori.



use is applicable where the choice of law rule is not defective, it does not need to be changed, but the particular circumstances of the case require that an equitable exception be made and some other system invoked.

There is a use of the repugnancy rule which, as far as I am aware, has not been suggested as a possible function of the external public policy rule. It has already been observed that these rules are not identical nor do they perform identical functions, but this function of the repugnancy rule could, perhaps, have some relevance in the field of conflict of laws.

Dealing with the repugnancy rule Professor Bentsi-Enchill<sup>1</sup> has written as follows:

"It is submitted that on most of the few occasions when this rule has been used as a justification for refusing to apply an alleged principle or rule of native law, the Court was grappling with the difficult problem of ascertainment, and refusing to accept the tendentious and "unreasonable" contentions made on the part of one litigant or another regarding the character or mode of application of the said principle or rule.

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1. (1969) 1(2) Zambia L.J. 1-30. I am grateful to Mr. T.W. Bennett, B.A., LL.B., of the University of Cape Town, for drawing this article to my attention.

Take for example the established judicial doctrine regarding one type of long possession, which was based on the repugnancy rule. The alleged rule of native law in regard to which this doctrine has been formulated was stated by the Full Court in the Bokitsi Case to the following effect:

"The original owner of land who has not specifically divested himself of this ownership can, after any length of time and under any circumstances, obtain the recovery of his land from persons setting up an adverse title, whatever may be the detriment caused to such persons by the fact that the original owner slept on his right."

This, let it be noted, is a peculiarly tendentious and unreasonable version of the rule; but this presumably is what was being urged on the Court. That Court responded by declaring that if persons in possession had occupied the land "... under such circumstances ... as would cause them to believe themselves to be the owners of the land, and to incur pecuniary responsibilities in consequence of that belief, we think it is right to state that in our opinion it would be contrary to the principles of equity to allow native law to apply in its entirety."

The doctrine of repugnancy need not have been invoked at all if the rule had been more reasonably stated, or if the Court had

advised itself as to the equitable procedures of adjudication and dispute settlement that are part of native customary law."<sup>1</sup>

It will have been observed that Professor Bentsi-Enchill is critical of this use of the repugnancy rule but it is tentatively suggested that it may be that the external public policy could be profitably used in this way to save time and expense. For instance, surely it would be uneconomical in a case where the validity of a contract is impugned on the grounds of force and fear (duress) to allow the rules on the subject of the relevant foreign lex causae to be proved where, even if the contract is valid under that system, it will be declared void for being contrary to external public policy?

It would, perhaps, now be useful to summarise the different functions of the external public policy rule which have been identified and discussed in the previous pages.

The first use of the rule is to exclude from enforcement an objectionable law of the foreign lex causae. It is not, however,

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1. Bentsi-Enchill, at 20-21. The reference to the Bokitsi case is given as 65 (1902) Sar. F.L.R. 148 at 160. This Gold Coast (Ghana) case is also dealt with shortly in Allott, New Essays in African Law (1970) 161. The formulation of the repugnancy rule relevant in this case is "repugnant to natural justice, equity and good conscience".



enough that the rule of foreign law be objectionable, the actual outcome of the case, if that law is applied, must also offend.

The rule finds a second use in the situation where the system indicated is accepted as applicable and its relevant laws as generally acceptable, but that an exception to their operation is thought justified in the peculiar circumstances of the particular case in question (the reserve equity principle).

The following two functions relate to the operation of the rule in the context, not of foreign laws, but of the choice of law rules of the forum. It may be thought in a case that that an established choice of law rule indicates an inappropriate system. Here the external public policy rule may be used as a corrective. The rule may be used in circumstances where the choice of law rule is defective and what is really required is its revision, or it may be used where the forum's relevant choice of law rule is generally satisfactory but an equitable exception to its operation is required in the peculiar circumstances of the particular case in question. So the rule can act as a corrective to defective choice of law rules or as a reserve equity principle in respect of sound choice of law rules.

The final use suggested for the rule, as we have recently seen, is to preclude, in certain circumstances, the necessity for the proof of foreign law.

### Filling the gap

A matter which requires consideration is the question of which rules should apply where the relevant foreign rules have been exercised by an application of the external public policy rule. A similar problem exists as regards applications of the repugnancy rule. As regards the operation of the external public policy rule, we are only concerned at this stage with the situation where a rule of a selected foreign lex causae is denied application as being contrary to external public policy. We are not here concerned with the situation where the external public policy rule exercises its choice of law role. The view seems to be that, in this latter situation, the invocation of public policy is specifically directed at ensuring that the lex fori will be applied,<sup>1</sup> although, in theory, it is not inconceivable that public policy could demand the application of some foreign system other than the foreign lex causae indicated by the usually applicable choice of law rule of the forum. The use of the lex fori in these situations cannot, however, be used to justify its use in the very different situation where a rule of foreign law is denied application as being contrary to external public policy. However, in these

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1. Paulsen and Sovern, op. cit. supra, 981.

circumstances too, it has generally been assumed that the gap should be filled by the application of the lex fori.

I would suggest that in many cases there is no need to provide rules of law to fill the gap. In many cases once the objectionable foreign rule is ignored, an acceptable conclusion follows and there is no need for substitute rules. Thus where there is a foreign incapacity to marry, based on race or religion, this can be ignored and the marriage allowed or recognised without substituting any new laws. Some situations are, however, not this simple. For example, if our courts applied the personal law of the parties in divorce actions, it could happen that the relevant personal law in a particular case does not allow divorce. This may be thought to be contrary to external public policy, but what law is the forum going to apply to decide whether a divorce is appropriate? It could be argued that the lex fori is the obvious system to apply, but it may not be necessary to apply any system; all that the court has to rule is that it would be contrary to external public policy to refuse a divorce in the particular circumstances, it need not propound and apply any rules of law. However, the court may well wish to apply rules of law in this situation and the rules of the lex fori may be thought appropriate. It may also be that, in some cases, although I cannot think of any, it will be necessary to fill a gap, left by an application of the external public policy rule, with a rule or rules of law. Again here the rules of

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1. See, for example, the formulation of Rule 128 in Dicey and Morris.
2. See Kahn-Freund, General Problems, at 283.



the lex fori may seem the obvious ones to apply.

There could, however, be incompatibility problems in some cases if one attempted to fill gaps made in a foreign system by the application of the external public policy rule with rules of the lex fori. As mentioned earlier, this problem of filling the gaps is also present where the repugnancy rule is used.<sup>1</sup> Here the situation is significantly different from that where the external public policy rule is used. Here a gap is made in the internal rules of one of the branches of the local legal system, not in some foreign lex causae. In these circumstances, it is highly desirable that the gap be filled with rules of law rather than having each case decided on its merits. For example, if the customary law rule that marriage may be dissolved by divorce by the agreement of the parties concerned without "just cause" falls foul of the repugnancy rule, as has been held in Rhodesia,<sup>2</sup> then grounds justifying divorce must be found and laws giving effect to these must be developed or borrowed by the courts or enacted by the legislature. In view of the large number of divorces likely to be sought, and for other reasons, it is clearly desirable that rules should here be propounded rather than leaving each case to be decided on equitable grounds. Rules are here the aim, but they could, of course, be developed through the generalisation of equitable decisions. In one

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1. Thesis, 22-4.

2. Thesis, 22-4.

Rhodesian case concerned with divorce for impotence it was held that, where there was a gap of this sort in the customary law, it should be filled by the imported system.<sup>1</sup> However this is not the general approach to divorce in respect of customary marriages in Rhodesia. As already noted, such divorces without just cause have been held repugnant, but the common law has not been invoked to provide these "just causes"; the courts have developed new rules to deal with this problem. They have used as an important guide in this task the rules of customary law which determine fault for the purposes of the return of marriage consideration on the break up of a marriage.<sup>2</sup> To blindly follow the common law in these sorts of circumstances could lead to incompatibility and injustice. The same point can be made in respect of the operation of the external public policy rule. If gaps made by the use of this rule have to be filled with rules of law, which must rarely be the case, then the use of the lex fori for this purpose may not always be appropriate. I should add that in Rhodesia since legislation of 1969 it would seem that the courts there are to fill gaps by applying "principles of justice, equity and good conscience".<sup>3</sup>

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1. Chawa v. Bvuta, 1928 S.R. 98 at 100.

2. Goldin and Gelfand, op. cit. supra, 148-150; Child, The History and Extent of Recognition of Tribal Law in Rhodesia, (1966) 41-7; Thesis, 23-4.

3. The African Law and Tribal Courts Act, 1969, ss.3(3) and 4. See Goldin and Gelfand, op. cit. supra, 63. On these principles see Derrett, "Justice Equity and Good Conscience", in, Anderson, Changing Law in Developing Countries (1963), at 114-153.

That finishes then this examination of the external public policy rule and its functions. Other aspects of public policy in conflict of laws will be considered in the chapters that follow. This external public policy rule has, undoubtedly, a very important role to play in conflict of laws. A choice of law rule indicates the system thought appropriate to solve a dispute, it is not "result-selective". Thus a foreign system may be indicated as applicable by a choice of law rule even though its actual solution to the matter in issue is unacceptable to the forum. Obviously some device is needed to deal with this situation and the one used is the external public policy rule. Not surprisingly, then, the applications of the external public policy rule are themselves concerned with results of cases in which foreign law is applied rather than with the foreign laws themselves. Whether the external public policy rule should also be allowed to exercise a choice of law function is a controversial matter. This use is, no doubt, undesirable, at least in principle, where what is needed is reform of the relevant choice of law rule - one may excuse it where the judge using the rule in this way is faced with an unsatisfactory choice of law rule which he cannot change. The use of the external public policy rule to give equitable relief in special circumstances from generally satisfactory choice of law rules is less easy to condemn. In attempting to draw an appropriate balance between flexibility and



certainty in the formulation and application of rules of law, it may be appropriate in some branches of law, or in some parts of some branches, to leave the courts with a residual discretion to depart from the formulated rule in special circumstances. If this is true, conflict of laws, or some fields within it, may well be appropriate spheres for this approach.

## CHAPTER 2

## THE NON-ENFORCEMENT OF FOREIGN REVENUE LAWS

"As to public policy one finds it difficult to see how non-recognition of foreign revenue laws is to be founded on this "unruly horse". One would have thought that it was public policy that persons should pay their taxes and not evade such payment by escaping the country which imposed them". - Vieyra, J.

There is now a great deal of judicial authority for the proposition that our courts will not enforce foreign revenue laws and decrees. The most important decision in this regard is undoubtedly that of the House of Lords in Government of India v. Taylor (1955),<sup>1</sup> but there have been a significant number of other cases<sup>2</sup> in recent years supporting this almost universally adopted rule.<sup>3</sup> This rule seems, on the face of it, a rather strange one for it would appear to assist dishonest persons to evade their

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1. [1955] A.C. 491, (H.L.); [1955] 1 All E.R. 292 (H.L.).

2. Dicey & Morris, Conflict of Laws (9th ed., 1973) 75; Lufttransportunternehmen GmbH & Co. Kg. v. Eurocontrol, [1977] 1 C.M.L.R. 88 (European Ct.); Re Lord Cable (deceased), [1976] 3 All E.R. 417 (C.A.); Brokaw v. Seatrain U.K. Ltd., [1971] 2 Q.B. 476 (C.A.); 1971 2 All E.R. 98; Bath v. British Malayan Trustees Ltd., [1969] 2 N.S.W.R. 114, Scottish National Orchestra Society Ltd. v. Thomson's Executor, 1969 S.L.T. 325; Jones v. Borland, 1969 (4) S.A. 29 (W); Weir v. Lohr, (1968) 65 D.L.R. (2d) 717; Pye Ltd. v. B.G. Transport Service Ltd., [1966] 2 Lloyd's Rep. 300; Commissioner of Taxes v. McFarlane, 1965 (1) S.A. 470 (W); U.S.A. v. Harden, (1964) 41 D.L.R. (2d.) 721; Rossano v. Manufacturers' Life Insurance Co., [1963] 2 Q.B. 352; Metal Industries (Salvage) Ltd. v. Owners of S.T. 'Harle', 1962 S.L.T. 114.

3. Exceptions to the rule occur as between states of a federation (see supra p. 56, infra.) and where an international convention applies. The fact that both countries are in the Commonwealth does not effect the operation of the rule - Government of India, supra.

obligations and it is to consideration of the reasons for this rule that I want to devote much of this chapter. The rule came into existence at a time when many foreign revenue laws were clearly contrary to public policy, but times have changed and the ingenious efforts to justify the rule in present day conditions provide an interesting subject for study.

Before passing on to a consideration of the policy reasons for the rule, it would perhaps be appropriate to set out shortly some of the ancillary rules in this field. Thus, characterisation of a foreign rule as revenue or not is a matter for the lex fori,<sup>1</sup> though the rule should be viewed in the context of its own system before the decision is made.<sup>2</sup> Many different claims and decrees have been designated as revenue in nature.<sup>3</sup> Indirect enforcement, as well as direct, will not be permitted.<sup>4</sup> For instance, in a Canadian case<sup>5</sup> the court rejected the argument that a compromise agreement in respect of a revenue debt altered the basis of

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1. Metal Industries (Salvage) Ltd., supra.

2. Anton, Private International Law (1967) 49.

3. Dicey & Morris, op cit. supra, 78. Some think the category is too wide. This is discussed later in this chapter at pp. 46 and 67.

4. North, Cheshire's Private International Law (9th ed., 1974) 136.

5. U.S.A. v. Harden, supra.



liability, making it contractual. The ban, it is thought, extends also to ancillary orders, such as a <sup>decree</sup> judgment for expenses.<sup>1</sup> Although our 'courts do not sit to collect taxes for another country',<sup>2</sup> this does not mean that they will give no recognition to such tax laws. Thus a foreign revenue law rendering a contract void will be recognized if the law is a rule of the lex causae.<sup>3</sup> Then an executor may be obliged to pay foreign estate duty where otherwise the wishes of the testator, as regards the paying of legacies to persons in the foreign country in question, would be frustrated. Thus in the Scottish case of the Scottish National Orchestra Ltd. v. Thomson's Executor<sup>4</sup> Scottish executors were held to have acted lawfully in sending £16,000 to the Swedish administrator for the payment of Swedish inheritance tax, for, until this claim was met, legacies paid to the Swedish legatees would have to have been recovered by the local administrator and paid towards the satisfaction of the outstanding inheritance tax.

The approach adopted in the Scottish National Orchestra case has

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1. By analogy with the position relating to penal laws. See Attorney-General for Canada v. William Schulze and Co., (1901) 9 S.L.T. 4.
  2. Denning, L.J. in Regazzoni v. K.C. Sethia (1944) Ltd., [1956] 2 Q.B. 490 at 515 (C.A.).
  3. Dicey & Morris, op. cit. supra, 78; M. Mann, 'Foreign Revenue Laws and the English Conflict of Laws' (1954), 3 I.C.L.Q. 465 at 472.
  4. 1969 S.L.T. 325. Cf. Jones v. Borland, supra.

received further extension in Re Lord Cable (deceased).<sup>1</sup> The facts of this case are rather complicated, but the first proposition in this decision of relevance here is that the trustees of a foreign testamentary trust may remit trust funds from England to the foreign country in question, in this case India, even though these are required to pay taxes there and even though this may well prejudice the interests of beneficiaries, where the failure to remit such funds may lead to the infliction of harsh penalties on the trustees under the law of that foreign country.<sup>2</sup> It was also conceded in this case, properly in the view of the court, that, where trustees in a foreign trust had paid taxes due by the trust in the foreign country, they have the right to be indemnified out of trust assets even where these are situated in England. This last proposition would be approved by North for he makes a similar point in respect of the case of Rossano v. Manufacturers' Life Insurance Co.<sup>4</sup> He summarises the facts of this case as follows:

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1. [1976] 3 All E.R. 417 at 436 (Ch.D.).
  2. A defect of this decision is that it would seem extremely doubtful in the circumstances that the penalties would, in fact, be inflicted on the trustees as they had acted throughout with the consent of the Indian exchange control authorities.
  3. Re Lord Cable, supra, at 435-6.
  4. [1963] 2 Q.B. 352.

"The plaintiff was an Egyptian national resident in Alexandria; the defendants were an insurance company with a head office in Toronto and branches in many other countries. The action was to recover money due under three policies of life insurance issued by the defendants. The first two policies required payment in London in pounds sterling; the third directed payment at New York in dollars."<sup>1</sup>

North then continues:

"One defence raised by the defendants was that two garnishee orders had been served on three of their branches in Cairo which would render them responsible for the payment of certain taxes alleged to be due from the plaintiff to the Egyptian government if they paid him before he had satisfied this fiscal liability. The defence failed, for to allow the garnishee orders, which related solely to taxation debts, to defeat the plaintiff's cause of action, would constitute an indirect enforcement of a foreign revenue law. The obvious result of dismissing the action would be the recovery of the taxes by the Egyptian government.

It is questionable whether this ban on indirect enforcement is not too rigid. If, for instance, in the Rossano Case, the defendants had in fact paid the taxes due to the government, would not an action based upon the unjust enrichment of the plaintiff have succeeded?"<sup>2</sup>

North makes a similar point in respect of the case, Brokaw v. Seatrain

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1. North, op.cit. supra, 136.

2. North, 136.



U.K. Ltd.<sup>1</sup>

A useful starting point in our examination of the justification for the rule on foreign revenue laws is the relatively recent South African case of Commissioner of Taxes v. McFarland.<sup>2</sup> The reason for this is that the judge in this case reviewed the arguments usually put forward in justification of the rule.

In McFarland Vieyra, J. had to decide whether a final judgment of the High Court of Southern Rhodesia against the defendant in respect of taxes owing by him under legislation of the Federation of Rhodesia could be enforced in South Africa. There was no South African decision on the matter, so the learned judge turned to the substantial authority on this point available in other systems. He reviewed mainly decisions from England and other English law countries, but also referred to the position in other jurisdictions. In the context of the prevalence of the rule denying foreign revenue laws enforcement, he quoted the remarks of Lord Somervell in Taylor:

'The appellant was ... in a difficulty from the outset in that, after considerable research, no case of any country could be found in which taxes due to State A had been enforced in the courts of State B.'<sup>3</sup>

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1. North, 137.

2. 1965 (1) S.A. 470 (W).

3. [1955] 1 All E.R. 292 (H.L.) at 301. Quoted by Vieyra, J. at 472.

Having found a great deal of overseas authority for the rule against the enforcement of foreign revenue laws and decrees, Mr. Justice Veyra turned to consider the reasons for the rule. Serious judicial attempts to justify the rule on grounds of policy rather than authority are not common; there is a tendency to state the rule 'as if it were of long standing and so well-established, so self-evident, as to require no justification'.<sup>1</sup> Policy considerations, where mentioned at all, are frequently confined to vague and superficial formulations.<sup>2</sup> In Kahn's view, '[w]hat reasons have been advanced appear to have been given a posteriori, after the rule had become established'.<sup>3</sup> However, the reasons for the rule are essential to understanding its scope and application,<sup>4</sup> and the justification for the rule is far from self-evident. Indeed, at first sight, the rule seems to be a negation of international

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1. Kingsmill Moore, J. in Peter Buchanan Ltd. v. James McVey, [1954] I.R. 89 at 105.
  2. See, for example, the remarks of the judges in the Court of Appeal in Delhi Electric Supply and Traction Co., [1954] Ch. 131, set out in Kahn, 'Enforcement of Foreign Revenue Law', (1954), 71 S.A.L.J. 275 at 277. E.F. Scoles, 'Interstate and International Distinctions in Conflict of Laws in the United States' (1966) 54 California L.R. 1599 at 1607 speaks of this rule as '[t]he often repeated but seldom analyzed rule'.
  3. Kahn, op. cit. supra, 277.
  4. 'One trouble about a rule of law which everyone takes for granted is that no judge ever bothers to state the reasons for it. A natural consequence of this may be that the rule extends itself gradually, and finally is applied to many new sets of facts to which the reason for the rule, assuming that there is a reason for it, has no relation': R.A. Leflar, 'Extra-state Enforcement of Penal and Governmental Claims' (1932) 46 Harv. L.R. 193 at 196.

comity<sup>1</sup> and to assist taxpayers to evade their lawful obligations.

Mr. Justice Veyra, relying, in part, on Professor Kahn's note and other material provided by the professor, surveyed the arguments usually given for the rule<sup>2</sup> and found several unconvincing. The arguments so designed were that the enforcement of foreign tax laws would be against public policy, that it would be undesirable, in the interests of international comity, for the courts to inquire whether such laws were in accord with the policy of the domestic State, that such laws are akin to penal laws, which are denied extra-territorial effect, and, finally, that the courts would be reluctant to enforce intricate foreign tax systems or to involve themselves generally in the inconvenience of hearing foreign tax cases.<sup>3</sup>

However, there was one explanation for the rule which seemed to Mr. Justice Veyra to be 'fundamental and unexceptionable'. He quoted with approval the dictum of Lord Keith in Government of India:

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1. 'It can hardly be regarded as a matter of comity that the courts of this country will not entertain a suit by a foreign State to enforce its revenue laws': per Viscount Simonds in Regazzoni v. K.C. Sethia (1944) Ltd., [1958] A.C. 301 at 318 (H.L.).
  2. Relevant arguments were listed in the Missouri Court of Appeals case of State ex rel. Oklahoma Tax Commission v. Rodgers, (1946) 193 S.W. (2d) 919, a case on the recognition of revenue laws of one State of the United States in another. The case is discussed at length in T.B. Stoel, 'The Enforcement of Foreign, Non-criminal Penal and Revenue Judgments in England and the United States' (1967), 16 I.C.L.Q. 663 at 668, 675-7.
  3. McFarland, supra, at 472-3.



'One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties.'<sup>1</sup>

After citing further authority on territorial sovereignty Mr. Justice Veyra concludes:

'To allow a foreign State, whether directly or indirectly, to obtain a judgment for taxes imposed on all those who in its eyes share in the economic or social life of that State, in the courts of another country, would be a judicial intervention in direct derogation of that country's territorial supremacy.'<sup>2</sup>

This approach finds support, too, in the 1964 Canadian case of the United States of America v. Harden.<sup>3</sup> The dictum of Lord Keith set out above is quoted in this case also.<sup>4</sup> It is also propounded in Dicey and Morris.<sup>5</sup>

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1. Government of India, [1955] 1 All E.R. 292 (H.L.) at 299, quoted in McFarland, supra, at 473.

2. At 474.

3. (1964) 41 D.L.R. (2d) 721.

4. At 724-5.

5. Op. cit. supra, p.78.

I submit that this currently popular sovereignty argument for the non-enforcement of foreign tax laws and judgments on which Mr. Justice Vileira places so much reliance, is fundamentally defective. Put at its simplest, this argument merely propounds the uncontentious view that, as every State has sovereignty over its own territory, it is under no legal obligation to enforce the revenue laws or decrees of another State. As a corollary, no State may claim legal effect for its revenue laws within the territory of another State. There may, of course, be exceptions, as, for instance, under tax conventions. No one, it can safely be said, doubts the general validity of these propositions. But the question here is not whether our State is obliged to apply foreign revenue laws but whether it is desirable that we should give effect in our own courts to these laws. Our courts apply foreign law to many disputes coming before them that involve foreign elements. This is not because international law compels this, but because our own sovereign, if one may use Austinian terms, so commands through his choice-of-law rules. Thus in the case of a person dying intestate domiciled abroad, our courts will apply the deceased's foreign domiciliary law to determine succession to his local movable estate. To do this voluntarily does not involve a loss of sovereignty; our sovereign could, at any time, revoke this rule. The question here, then, is: What should our sovereign command his courts to do as regards the enforcement of foreign revenue



laws? The sovereignty argument misses the point, and is irrelevant in the present context.<sup>1</sup> Savigny makes this point rather well. Of conflicts problems he says:

"Many have attempted to determine these questions by the principle of independent sovereignty alone, laying down the two following postulates:

- (1) Every state is entitled to demand that its own laws only shall be recognised within its bounds;
- (2) No state can require the recognition of its laws beyond its bounds.

I will not only admit the truth of these propositions, but even allow their extension to the utmost conceivable limits; yet I believe they afford little help in the solution of our problems".<sup>2</sup>

The fact that the sovereignty argument is not sound does not mean that there are no other arguments worthy of consideration for refusing to enforce foreign revenue laws. It is proposed now to examine each of these arguments; the reader will be able to form his own opinion on the correctness of Mr. Justice Vileira's view that these other arguments are generally unconvincing.

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1. On the sovereignty approach generally, see A.E. Anton, Private International Law (1967) 32.

2. Savigny, A Treatise on the Conflict of Laws, translated by Guthrie (2nd ed., 1880) 68.



One argument may be called 'the expense and inconvenience' approach. It is as follows: Our courts would spend valuable time in hearing foreign tax cases, which could well involve complex questions of foreign law. Such cases would involve the State in expense and bring unwelcome additional work to the already often overcrowded courts.<sup>1</sup> However, no State would be likely to sue abroad if it could litigate in its own courts,<sup>2</sup> and the burden of hearing foreign tax cases would be offset, at least in part, by the advantage of having certain of one's own revenue actions heard abroad.<sup>3</sup> If the burden became too heavy, steps could then be taken to alleviate the position.<sup>4</sup> In many other fields our courts have to involve themselves in the complexities of foreign legal systems because our choice of law rules so direct. To do so is, no doubt, an inconvenience, but this in itself is not a sound reason for refusing to undertake such an investigation where considerations of justice require it.<sup>5</sup>

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1. Kahn, op cit. supra, 278; Stoel, op. cit. supra, 677; A.R. Albrecht, 'The Enforcement of Taxation Under International Law' 1953 (30) B.Y.B.I.L. 454 at 463; Leflar, op.cit. supra, 218; Lord Somervell in Taylor, supra, at 301.

2. Leflar, op.cit. supra, 218; Stoel op. cit. supra, 677.

3. Stoel, at 677.

4. Albrecht, op. cit. supra, 463; Leflar, op. cit. supra, 219.

5. Albrecht, at 463; Leflar, at 218; Kahn, at 278.

Another possibly onerous task for the courts, if foreign revenue laws are to be enforced, is that of developing the appropriate choice-of-law rules. If foreign revenue laws were to be enforced by our courts, this would not mean that a foreign country could tax any person, whether linked to that country or not, in respect of assets, wherever situate, and then expect that such taxes would be enforced by our courts. Rules would have to be propounded by the courts defining the acceptable field of operation for the country's tax laws.<sup>1</sup> This may well prove a difficult task, but here again, it is a task undertaken in other fields, and there is no reason to believe it would be unduly burdensome.<sup>2</sup>

As regards the defendant, it can be said that tax litigation abroad would involve the delays, difficulties and expense of litigating outside the country where the cause of action arose.<sup>3</sup> Stoel, however, makes the

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1. 'There is no apparent limit to the revenue legislation which any country may bring into operation, and if all revenue claims were liable to be enforced in other countries the consequences would be, to put it no higher, arresting': per Evershed, M.R. in Re Delhi Electric Supply, [1953] 2 All E.R. 1452 at 1456. The official report expresses the same sentiment in more restrained language - 1954 [Ch.] 131 at 145, ~~at 1456~~. That rules could be developed designating the proper scope of tax legislation for purposes of external recognition and enforcement does not seem to have occurred to Evershed, M.R.
  2. Leflar, at 218. However, Scoles, op. cit. supra, at 1608 is of the view that 'tax structures are sufficiently complex and integrated with national economic policy to make the judicial system an awkward vehicle for the adjustments and compensations that can be negotiated and incorporated in tax treaties'.
  3. Stoel, at 678.

not completely convincing point that 'there would be no unfairness to the defendant in being forced to defend in a forum which he in effect chose by failing to make himself available in the plaintiff state'.<sup>1</sup> He continues: 'In the United States, at least, difficulties in defending and proving facts could be considered according to the normal doctrine of forum non conveniens.'<sup>2</sup>

There may be certain 'procedural stumbling blocks'. For instance, the procedures created for tax collection may not envisage or be able to deal with extra-territorial enforcement. Thus the official charged with the enforcement of a tax law may lack authority to sue extra-territorially. However, problems of this sort 'do not go to the fundamental question, because they can be all removed by any taxing state that sets out to do so'.<sup>3</sup> Again, 'the courts of the forum might find it difficult to hear claims arising out of certain foreign revenue laws, such as those intended to be administered by a commission. But most claims could be fully enforced by an ordinary trial and money judgment, and where there was no adequate machinery for enforcement the case could be dismissed under

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1. Steel, at 676; Leflar, at 218.

2. Steel, at 677. This doctrine is also used by the Scottish courts.

3. Leflar, 217-18. In Sydney Municipal Council v. Bull, [1909] 1 K.B. 7 it was held that the relevant tax legislation did not envisage or provide for extra-territorial enforcement of the local tax obligation. On an analogous situation see p.89, infra.



accepted rules.<sup>1</sup>

Two minor matters should be mentioned before considering the next argument. In this chapter revenue laws and judgments are dealt with together. In some respects relevant to our present investigation, such as ease of proof, they may differ, but, on the whole, I would submit it is both appropriate and convenient to view them together in this way. Then, some of the arguments put forward by certain writers in this field, for example, Leflar<sup>2</sup> and Stoel,<sup>3</sup> are propounded in the context of the enforcement of revenue laws and judgments as between sister States of a federation. One must remember, in assessing such arguments, that the case for enforcement within a federation is probably much stronger than is the case for enforcement as between independent States.<sup>4</sup>

The fact that the non-enforcement of foreign revenue laws is a universal practice save internally within federations<sup>5</sup> and within similar

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1. Stoel, at 677. See, too, Leflar, at 217-18.

2. Leflar, at 217-18.

3. Stoel, at 677. Scoles, op. cit., 1608.

4. Leflar, at 222.

5. Weir v. Lohr, (1968) 65 D.L.R. (2d.) 717. On the internal position in the United States, see Stoel, at 677 and Albrecht, at 463.

States founds three arguments against our courts enforcing these laws. The first argument is that we should not enforce foreign revenue laws unless foreign States are going to enforce ours; there must be reciprocity. There is some force in this approach, but a start must be made somewhere if a reform is to be introduced. The second is that there must be good reasons for a rule of such universal application. Such an argument may raise a presumption in favour of the rule, but it does not preclude its rejection after a careful consideration of the reasons for and against the rule in present conditions. An old rule such as the present one may be quite inappropriate in modern circumstances, whatever sense it might have made when first propounded. Then, last, it is said that there is no real need to enforce foreign revenue laws, for a State, knowing the rule, can take precautions to see that its tax laws will not require external enforcement. Thus, for instance, local incomes can be taxed at source, taxpayers can be refused permission to leave the country without tax clearance, and taxes such as import duties or local rates can be secured against the property, moveable or heritable, to which they relate. The rule of non-enforcement, then, will encourage States to enact effective tax laws and to create efficient tax collection systems. This may be true, but in modern conditions it is very difficult to prevent tax evasion,<sup>1</sup> and this last argument should not be given much weight.

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1. Leflar, at 216.

An argument for non-enforcement, supported in its more sophisticated form by that respected American jurist, Judge Learned Hand,<sup>1</sup> is based on public policy. This is a complex argument or group of arguments and has not always been understood by those referring to it.

The rule on revenue laws and judgments is thought to owe its origin in England to hostility to foreign tax laws that inhibited free trade.<sup>2</sup> The enforcement of such laws could be said to be contrary to public policy, but in modern conditions, with the welfare State, many feel that public policy requires that persons pay their taxes.<sup>3</sup> Some foreign taxes will, no doubt, prove objectionable, but they could be denied enforcement as being against public policy.<sup>4</sup> This would, however, involve the courts

1. Moore v. Mitchell, (1929) 30F. (2d) 600 at 604.
2. Kahn, at 275: Kingsmill Moore, J. in Peter Buchanan, supra, at 100; Evershed, M.R. in Re Delhi Electric Supply, supra, at 1456; M. Mann, op. cit., 472.
3. 'It may fairly be said that there is a currently developing public morality which considers the obligation to pay taxes validly imposed to be as binding as the obligation to pay a private debt voluntarily undertaken': Leflar, at 216. See, too, McFarland, supra, at 473. It has been suggested by Evershed, M.R. in Re Delhi Electric Supply, supra, at 145 that 'justice' requires the non-enforcement of all foreign revenue laws. In reply Albrecht at 462 has asked: 'What justice is there in facilitating fiscal evasion by itinerant taxpayers?' Then at 463 he states: 'The effect of the present rule can hardly be said to have produced "justice" in any of the leading cases.'
4. Albrecht, at 462-3.



in distinguishing between those foreign tax laws that are acceptable as not contrary to public policy and those that are not. But designating foreign tax laws as contrary to public policy could offend a foreign Government, embarrass our own Government and damage relations between them. To disrupt our country's good relations with other States is, itself, contrary to public policy, a concept wide enough to cover moral, political and economic interests. Again, for the courts to get involved, even indirectly, in international politics may be thought to be usurping the function of the executive. The courts must not, it is argued, involve themselves in such matters but must leave them to the executive, as they do, for instance, in the matter of the recognition of new Governments and States. The only safe approach for the courts, then, is universal rejection; they must refuse to enforce all revenue laws. The matter of the enforcement of these laws must be left to Governments to settle by treaty, as is done with extradition.<sup>1</sup>

This 'embarrassment approach' is not without its critics. 'One com-

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1. 'Nor is modern history without examples of revenue laws used for purposes which would not only affront the strongest feelings of neighbouring communities, but which they would view counter to their political aims and vital interests. Such laws have been used for religious and racial discrimination; for the furtherance of social policies and ideals dangerous to the security of adjacent countries; and for the direct furtherance of economic warfare. So long as these possibilities exist, it would be equally unwise for courts to permit the enforcement of the revenue claims of foreign States or to attempt to discriminate between those claims which they would not enforce. Safety lies only in universal rejection': per Kingsmill Moore, J. in Peter Buchanan, supra, at 107. See, too, Kahn, at 277-8.

mentator has suggested that nations will resent a refusal to hear the case because the judgment is one for a tax as much as a refusal on public policy grounds.'<sup>1</sup> But, in the view of Stoel, '[t]he rebuttal is that only in the latter case is there an element of discrimination among nations, and it is precisely this element which is likely to have foreign policy repercussions'.<sup>2</sup> A very rough analogy could perhaps be drawn with the approach to political offences in extradition. Here, too, safety has been sought in a general approach that denies extradition in all political crimes, whether the offence has our disapproval or our approbation.

It may be felt that this argument is overstated and that many, perhaps most, States are not as sensitive as is suggested. Then, as already noted, not all tax laws and decrees would be enforced. Rules would have to be devised determining the proper sphere of foreign tax legislation. Objectionable tax laws could sometimes be excluded by these rules without the necessity of invoking the public policy rule, in the same way that objectionable expropriation laws, claimed to have extra-territorial effect, can sometimes be rendered inapplicable by the use of

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1. Stoel, at 678, referring to M. Mann, op. cit. supra, at 470-71 note 102. Mann's views are shared by Leflar, at 217.

2. Stoel, at 678.

the rule that title to property is governed by the lex situs.<sup>1</sup> Judges who hesitate to condemn foreign laws as contrary to public policy could perhaps sometimes find refuge in the already existing practice of designating such laws penal;<sup>2</sup> though this type of semantic malpractice is not to be encouraged, whatever the motive.<sup>3</sup>

The argument that the application of foreign revenue laws would involve the courts in this task of developing rules defining the legitimate scope of foreign countries' tax laws and that this would impose an unjustifiable burden on the courts, has already been noted. It has also been averred that this task would lead to fine distinctions being drawn between enforceable and unenforceable tax laws and that this could disrupt good relations with foreign States.<sup>4</sup> This is not a new

1. See, for example, Government of the Republic of Spain v. The National Bank of Scotland Ltd., 1939 S.C. 413. See also Dicey & Morris, op.cit. supra, 558.

2. Dicey & Morris, 73.

3. Calling laws penal when they are in fact contrary to public policy in the international sphere can cause confusion, for foreign penal laws are denied external enforcement but are not refused recognition as operative within their territory, while foreign laws contrary to public policy may be denied all recognition, internal and external. See p.93 infra.

4. Steel, at 678-9.



point, but merely another aspect of the public policy argument just discussed at some length.

A further possible argument on the same lines is that it may prove very difficult or even impossible for the courts to create satisfactory rules to operate in this sphere. What taxes should our courts recognize a foreign State as being entitled to impose? In respect of which assets and persons should it have this power? These are real problems, but they do not seem to be insoluble, and I know of no judge or jurist who has suggested that they are.

As we will see later, foreign penal laws are not enforced,<sup>1</sup> and support is drawn from this rule for the rule relating to foreign revenue laws and decrees.<sup>2</sup> In certain respects these two types of laws are very different, and this has been pointed out on a number of occasions.<sup>3</sup> However, it is argued that penal laws and revenue laws are analogous in that they are both branches of public law enacted and enforced by a State by virtue of its sovereign power. This view is stated in even wider terms in Dicey and Morris where it is said that foreign tax laws are not

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1. See chapter 3. at

2. McFarland, supra, at 473; Kahn, at 277; Albrecht, at 463; Leflar, at 219.

3. See the authorities cited in the previous footnote.

enforced, in conformity with the general rule that English courts refuse to enforce any claim which is 'a manifestation of a foreign State's sovereign authority'.<sup>1</sup> It is obvious that what we are here faced with is, in fact, the sovereignty argument that has already been considered. No new point is being made. This proposition of Dicey and Morris is given further consideration later in this work.<sup>2</sup>

These, then, are the arguments for the non-enforcement of foreign revenue laws and decrees. It is suggested that they are not convincing. There are strong moral reasons for enforcing at least some foreign revenue laws and decrees, and no really sound reasons have been propounded why they should not be. On the moral position one can do no better than to quote Leflar:

'The unreasoning and anti-social sympathy which in the past and even today is often semi-publicly expressed for those who seek to evade the demands of the tax gatherer cannot stand up under intelligent analysis. The tax burden is a tolerable thing only as it is fairly distributed. Complete evasion by some inevitably increases the burdens of others. An attitude which unnecessarily fosters and preserves this inequality is indefensible. As the total tax burden steadily increases by reason of the ever-broadening areas of governmental activity, the private incentive for avoidance

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1. Dicey & Morris, 76; M. Mann, at 469.

2. See p.99 infra.

and evasion likewise increases, and legal ingenuity coupled with private trickery tends to keep pace with the incentive. This very fact is naturally producing some change in public attitude towards evaders; the demand for fair and scientific allocation of tax duties is coupled with some demand for thorough and efficient enforcement of the duties imposed. It may fairly be said that there is a currently developing public morality which considers the obligation to pay taxes validly imposed to be as binding as the obligation to pay a private debt voluntarily undertaken. If this be true, it is then also true that legal loopholes permitting evasion of validly imposed tax duties should not be permitted to continue except insofar as genuinely substantial reasons require their continuance.<sup>1</sup>

The exception to the rule of non-enforcement which has developed in the case of inter-State enforcement within a federation suggests that the traditional rule is not viable where countries are very closely linked. However, it is interesting to note in this context that English or Scottish tax judgments will not be enforced in Jersey, Guernsey or the Isle of Man, nor will such decrees of the courts of these islands be recognised in England and Scotland.<sup>2</sup> There is, of course, reciprocal enforcement as between the constituent elements of the United Kingdom. Again, the Convention of 27 September 1968 on Jurisdiction and Enforcement of Civil

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1. Leflar, op. cit., 216.

2. North, op. cit., 668, 669.



and Commercial Judgments, designed, among other things, to facilitate the enforcement of decrees of courts of countries in the European Economic Community in other member states of the community, does not apply to tax decrees.<sup>1</sup> These instances perhaps suggest that the evasion of tax liability in fact resulting from the non-enforcement rule does not present a problem to States, however inequitable individual instances of such evasion may seem. Against this, it is true that a significant number of conventions providing for external enforcement do exist,<sup>2</sup> though their popularity seems to be on the wane. It is generally agreed that the only practical way of now providing for the enforcement of foreign revenue laws and decrees would be by legislation, preferably based on bilateral or multilateral international agreements. These could ensure reciprocity and could be specially adopted to fit the requirements of particular situations - it may be desirable to vary the degree and type of recognition afforded as between different States, as is done in extradition. As in so many fields of private international law, one can only await future developments with keen anticipation.

In conclusion, I would like to deal shortly with the characterisation problem that arises in these cases concerned with foreign revenue laws.

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1. These are excluded as not being decrees obtained in civil and commercial matters. See Lufttransportunternehmen GmbH & Co. Kg. v. Eurocontrol, [1977] 11 C.M.L.R. 88 (European Ct.). See infra.

2. (1950) 50 Columbia L.R. 491.

It has already been observed that the question whether or not a law is a revenue one is a matter for the *lex fori* though the relevant law should be viewed in the context of its own system.<sup>1</sup> It has also been noted that many different rules requiring payment have been designated revenue laws.<sup>2</sup> Dicey and Morris<sup>3</sup> lists the following types of laws requiring payment as having been held to be revenue laws: rules imposing an income tax, a customs duty, a stamp duty, a succession duty, a municipal contribution, a capital gains tax, a profits levy and a compulsory contribution to a state insurance scheme. The conclusion in Dicey and Morris is that, although a revenue law has not been specifically defined in this context by the courts, it "would appear to be a rule requiring a non-contractual payment of money or kind in favour of the State or some department or subdivision thereof."<sup>4</sup> However, "exchange control regulations, moratorium laws and rules abrogating gold clauses, which do not provide for the collection of money but merely for the protection of its value, have not been so treated."<sup>5</sup>

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1. See p.43, supra.

2. See p.43, supra.

3. Dicey and Morris, op. cit. supra, 78.

4. Dicey and Morris, 78.

5. Dicey and Morris, 78. On the proper approach to foreign exchange control regulations see also Re Lord Cable (deceased), [1976] 3 All E.R. 417, 422-3, 433-4; Sing Batra v. Ebfahim, "The Times" May 3, 1977, C.A., [1977] 5 C.L. 368.

This definition in Dicey and Morris of revenue laws may be stated in rather broader terms. What must be distinguished are pecuniary claims by a state<sup>1</sup> based on ordinary private law grounds, the sort of claims that can arise between private individuals in fields like contract, delict, unjustified enrichment or succession, and these other pecuniary claims which can only be brought by the state. The first category may be called private law claims, the second category, public law claims. It is clearly only this second category of pecuniary claims by the state that can be designated revenue claims.<sup>2</sup> Even within this category it is arguable that certain claims should be allowed. These are state claims, in this category, for payment for a specific service rendered to the debtor. These claims may be analogous to enrichment or other private law claims, but they are clearly public law claims.<sup>3</sup> The point that these state claims should perhaps be allowed has been made by North<sup>4</sup> who states:

"It may even be questioned whether such a decision as that reached in Municipal Council of Sydney v. Bull accords with the growing practice

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1. The position in respect of claims by a state to specific property has been discussed in the section of the chapter on penal laws which deals with expropriatory laws.
  2. Some of the claims ostensibly falling into the first category may still be revenue where they are, in fact, disguised revenue claims. See U.S.A. v. Harden, *supra*, referred to at p.43, of this work.
  3. In Scots law, and certainly in some, perhaps many, other systems, an enrichment claim is a residual claim; it can only be brought where the law does not provide some other remedy. Thus, in these systems, where a state has an exclusive claim provided by legislation, there is no possibility of the state bringing any private law enrichment action in respect of that same claim. Varney (Scotland) Ltd. v. Burgh of Lanark, 1976 S.L.T. 46; F.C. Finance Ltd. v. Brown & Son, 1969 S.L.T. (Sh. Ct.) 41.
  4. North, *op. cit. supra*, 136.



of States and their subordinate bodies to furnish services in return for payment. The distinction is not obvious between, say, a claim for unpaid water rates and a claim by a state owned railway to recover the charge due for goods carried."<sup>1</sup>

I should, perhaps, add that in Municipal Council of Sydney v. Bull<sup>2</sup> the claim designated revenue in nature was claim by a local authority for a compulsory contribution to the costs of improvements to a street against the owner of a house within the improvement area.

F.A. Mann<sup>3</sup> makes this same point. He postulates two general exceptions to the non-enforcement of these foreign public law claims. Of the first he says:

"The first case occurs where a foreign State has made payments or conferred benefits under its social security legislation or otherwise rendered services and by the terms of the legislation is entitled to repayment. In such a case the original payment or other benefit may be said to have been received on the footing of the statutory terms, i.e., on terms which contemplate repayment and which are in the nature of what

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1. North here is obviously of the view that this claim for carriage charges would not be classified as a revenue claim but this is not necessarily the case - see p.74, post.
  2. [1909] 1 K.B. 7. It is not clear from the report to what extent the owner benefitted from the improvements.
  3. (1971) I Hague Recueil 115 at 173.

one may almost describe as an implied condition. If the foreign State enforces the terms of the payment, it can hardly be said to do so jure imperii, by virtue and in the form of a sovereign command. The claim is rather of a quasi-contractual nature and for this reason ought to succeed."<sup>1</sup>

Mann's argument here is certainly a tenable one although he has rather overstated his case. There is now a decision supporting this approach. It is the Canadian case of Weir v. Lohr.<sup>2</sup> In this case it was held that rules, legislative in origin, entitling a province to recover medical expenses, incurred in respect of a compulsory contributor to a state health scheme, from the contributor where he has recovered from the wrongdoer, are not revenue laws.<sup>3</sup> Here, as was noted in the case, the province's claim founded on a legislative provision of public law is closely analogous to that arising in favour of an insurer where an insured, indemnified by the insurer, is also compensated for the same loss by the wrongdoer. The province's claim here would clearly fall within the wide

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1. At 173. Mann gives examples at 173-4 of the type of claim he has in mind.

2. (1968) 65 D.L.R. (2d.) 717.

3. There was an alternative ratio: the rule on the non-enforcement of foreign revenue laws does not apply as between the provinces of a state.

definition of revenue laws considered earlier. However, some adjustment of the traditional approach to exclude claims like this one from the definition of revenue laws would, perhaps, be an improvement.

F.A. Mann's second exception "arises where the plaintiff State has not made a payment to the defendant, but discharged one of his liabilities"<sup>1</sup>. An example Mann gives of such a claim is that available to a state, against a husband who has failed to support his wife, in respect of a refund of social security payments made to her by the state.<sup>2</sup> Mann feels that this exception is a more doubtful case than the first but again argues that this is not really a public law claim. One can, at least, concede that there seems no reason in principle why the two types of cases should be distinguished. Mann believes that there is substantial Continental authority supporting his second exception though there would not appear to be cases from the English-speaking world in favour of this exception.

Distinguishing between claims that fall into these exceptional categories and those which are properly designated revenue claims is not easy. This is illustrated by the Scottish case of Metal Industries (Salvage) Ltd. v. S.T. "Harle".<sup>3</sup> F.A. Mann comments on this case as follows:

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1. F.A. Mann, op. cit. supra, 174. All the references to Mann in this paragraph are to this article of his at 174-5.

2. If a husband has no duty to support his wife but is still liable under statute to reimburse the state for doing so, the situation that arose in Imam Din v. National Assistance Board, [1967] 2 Q.B. 217, then, presumably, this state claim would not be covered by Mann's second exception.

3. 1962 S.L.T. 114.



"...no difficulty arises where the foreign State claims the payment of contributions to statutory schemes providing health, unemployment, old age, family or similar benefits. Such contributions due from nationals or residents of the foreign State are in the nature of taxes and, in principle, cannot, therefore, be recovered extraterritorially. This was, indeed so decided in a Scottish case. A French ship was sold in Scotland. The proceeds were paid into Court. Part of them was claimed by the French State in respect of contributions due from the owners of the ship as employers under State schemes for health, insurance and family benefits. Lord Cameron held that these were "nothing more nor less than taxes or at least charges or impositions of a like nature and that the sums so levied form part of the revenue of the State". Accordingly they were held to be irrecoverable. The decision merits respectful approval."<sup>1</sup>

The contrary view is also tenable. Mann, as we have already seen, is of the view that a state's claim to be reimbursed by those benefitting from social security services rendered to them is not a revenue claim, but he views claims for contributions paid in advance for such benefits, contributions rather like insurance payments, as being revenue in nature. The distinction is surely not sound.

If some of these public law claims are not to be treated as revenue

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1. F.A. Mann, op. cit. supra, 173.

in nature, it does not follow that all such claims will be enforced by our courts. It will have to be determined in what circumstances such a claim by a foreign state will be viewed as legitimate and thus enforceable in our courts.<sup>1</sup> A similar problem arises in respect of State claims to moveable property. We will see later<sup>2</sup> that such claims are characterised as relating to title to moveable property, a juridical category governed by the lex situs at the relevant time. It is only where the claimant state's expropriatory law is part of the lex situs at the relevant time that it will be applied. Again a claim by a foreign state to take moveables on intestacy as the ultimus heres has, in one controversial case,<sup>3</sup> been characterised as being an intestate succession to moveables claim available only where the government claiming is that of the deceased's last country of domicile. How then are these non-revenue public law claims to payment to be characterised? Presumably by finding the private law claims to which they are closest in nature and giving them the same characterisation. A difficulty here is that

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1. A similar problem which would arise if foreign revenue claims were enforced was discussed earlier in this chapter. See p. 54, supra.

2. See pp. 88 - 89 of this work.

3. In re Maldonado (deceased), [1954] p. 223. In this case the approach was adopted that characterisation of the rule of foreign law in question was a matter for the foreign lex causae. See Anton, op. cit. supra, at 517.

many such claims will be found to be similar to claims based on unjustified enrichment and as there are a large number of different enrichment situations spread throughout the private law field, the choice of law rules on this topic are far from settled.

A recent decision of the Court of Justice of the E.E.C. provides no support for the view that certain claims by public law bodies which are not private law claims but are analogous to them, should not be treated as revenue laws. In this case, the Eurocontrol case,<sup>1</sup> the European Organisation for the safety of Air Navigation claimed payment from an air transport firm of charges which the organisation had levied for the use of its facilities by the firm. The pursuer had obtained a decree in his favour in the Belgian courts and then sought to have the decree enforced in Germany under the provisions of the Jurisdiction and Judgments Convention of 1968.<sup>2</sup> Whether this could be done depended on whether the claim and the subsequent decree fell within the category "civil and commercial matters" because the convention only applied to such matters. In Belgium it had<sup>been</sup> ruled that the convention was applicable<sup>the court</sup> holding that

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1. Lufttransportunternehmen GmbH & Co. Kg. v. Eurocontrol, [1977] 1 C.M.L.R. 88 (European Ct.). An interesting aspect of this case, not relevant here, is that it provides a rare example of characterisation by autonomous concepts.
  2. The Convention of 27 September 1968 on Jurisdiction and the Enforcement of Civil and Commercial Judgments.



"the determinative factor must be that the payment of the charges is ascribable to operations which must be described as commercial."<sup>1</sup> The Court of Justice reached a contrary conclusion. It ruled: "Although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so where the public authority acts in the exercise of its powers. Such is the case in a dispute which, like that between the parties to the main action, concerns the recovery of charges payable by a person governed by private law to a national or international body governed by public law for the use of equipment and services provided by such body, in particular where such use is obligatory and exclusive. This applies in particular where the rate of charges, the methods of calculation and the procedures for collection are fixed unilaterally in relation to the users, as is the position in the present case where the body in question unilaterally fixed the place of performance of the obligation at its registered office and selected the national courts with jurisdiction to adjudicate upon the performance of the obligation."<sup>2</sup>

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1. At 91.

2. At 101. On this approach it would seem possible to argue that charges levied by nationalised industries in the United Kingdom for providing gas, electricity, postal and telephone services are not to be viewed as "civil and commercial". Whether if they fall outwith this category they are necessarily revenue claims is not clear although there are some indications in the report of the case that this would be the position.

Multi-national corporations and other powerful commercial organisations may also have this power to dictate terms to their customers but their claims will, presumably, not be treated as revenue claims unless they are public bodies. Independent states, states and provinces of federations, regional, district and other local government bodies, international and multi-national organisations set up by states and departments and agencies of all these will, no doubt, be designated public bodies and, presumably, statutory bodies set up to run nationalised industries will also be viewed as public bodies.

## CHAPTER 3

FOREIGN PENAL LAWS<sup>1</sup>

"A penal rule is merely a rule which it is contrary to English public policy to apply,..."<sup>2</sup>

The rule that foreign revenue laws and decrees will not be enforced was considered in the last chapter. There is a similar closely related rule that denies application to foreign penal laws and decrees and its consideration is the subject of this chapter. Significantly different foreign laws and decrees are characterised as penal and it is intended, in this chapter, to identify and to assess the significance of these various categories of penal laws and decrees.

The leading authority on the proper approach to foreign penal laws is the Privy Council case of Huntington v. Attrill (1893),<sup>3</sup> an appeal from Canada. In this case the appellant lent money to a New York company of which the respondent was an officer. Subsequently he sued the respondent in a New York court for the unpaid balance of the loan founding his claim on section 21 of a local statute on companies<sup>4</sup> which provided

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1. On these generally see: Anton, Private International Law (1967) p.89 and pp.583-4; North, Cheshire's Private International Law (9th ed., 1974) pp.137-148; Dicey and Morris, Conflict of Laws (9th ed., 1973) pp.73-78, 82-83, 231-233, 1037, 1038, 1041; Morris, Conflict of Laws (1971) pp.332-339, 509, 512-515; Graveson, Conflict of Laws (7th ed., 1974) pp.177-178.

2. M. Mann (1956) 42 Tr. Grotius Soc. p.133 at p.146.

3. [1893] A.C. 150. For the parallel United States case, see 146 U.S. 657 (1892).

4. Cap.611 of 1875, New York State.



that:

"If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof".<sup>1</sup>

His action was successful and he was awarded \$100,240. Having failed to recover payment in New York State, he sought to have the decree enforced in Ontario by its High Court. He was unsuccessful, it being held that the legislation was penal and thus unenforceable in the courts of a foreign State. However, although his appeal to the Appeal Court was dismissed by a majority, he was successful on appeal to the Privy Council it being there held that the provision was not penal.

Their Lordships in their opinion, delivered by Lord Watson, advised that the decision whether or not a law was penal was for the lex fori and not for the legal system of the state in which the cause of action arose.<sup>2</sup> The rule to be applied, they held, was that "..... crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of someone representing the public, are local in this sense, that they are only cognizable and

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1. Huntington, at 153.

2. At 154-155. Mr. Justice Barton had reached a contrary conclusion in the Appeal Court. Their Lordships' conclusion is in accord with the generally accepted approach that characterisation is for the lex fori.

punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the Courts of any other country."<sup>1</sup> The expression "penal actions", so often used in this context is inaccurate as it "..... may embrace penalties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule."<sup>2</sup> "All the provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it

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1. At 156. A fine for entering into an agreement to restrict competition or to fix prices contrary to article 85 of the E.E.C. treaty is a penalty under s.14(1) of the Civil Evidence Act 1968 even though the fine is recovered in civil proceedings - see Re Westinghouse Electric Corporation, [1977] 3 All E.R. 703 (C.A.) and Re Westinghouse Electric Corporation (No. 2), [1977] 3 All E.R. 717 (C.A.). Such fines are enforceable in the United Kingdom - Re Westinghouse, at 715.
  2. At 156.

represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorised to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest but in the interest of the whole community".<sup>1</sup>

If one may summarize, a crime is then a breach of public law punishable at the instance of the state or its representative. Laws creating crimes are penal in this sense and will not be enforced abroad. Where a private individual institutes the proceedings enforcing the law he must be doing so in the interests of the whole community as its representative, even though, it would seem by implication from the use of the common informer as an example, the penalty goes to him and not to the state. On this approach it would seem that a law in the United States of America that provides for a civil action for treble damages by an injured party for breach of anti-trust laws is probably penal to the extent that it allows more than single damages, for the extra "damages" are a penalty for anti-social conduct not compensation for loss actually suffered. In this situation, unlike that involving the common informer, the action is not available to any member of the

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1. At 157 and 158.



public but only to the person injured or wronged, but this should not matter provided the damages are, in whole or in part, a penalty for anti-social conduct. On this argument exemplary damages in the English law of tort are clearly penal, or part penal.<sup>1</sup> Also clearly penal would be fines imposed for breach of an interdict or injunction and the forfeiture of the caution required in a case of lawburrows.<sup>2</sup> Foreign penalty clauses would, presumably, only be enforced to the extent that they are genuine pre-estimates of the loss suffered,<sup>3</sup> the characterisation of a claim as penal or not being a matter for the lex fori. Presumably too, the mere fact that a particular pecuniary claim is competent in civil proceedings in the forum does not mean that an identical foreign claim is not penal. Thus it would seem that a foreign award of exemplary damages in tort should be viewed as penal, even by an English court, that is, to the extent that it is penal and not compensatory.

This submission runs contrary to the views of two judges on this matter expressed in the recent English case of S.A. Consortium General

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1. On these damages see Rookes v. Barnard, [1964] A.C. 1129, Drane v. Evangelou, [1978] 2 All E.R. 437 and Hodgin and Veitch, (1972) 21 I.C.L.Q. 119. Exemplary damages are not found in Scots law. See Walker, The Law of Delict in Scotland (1966) 466-467.
  2. On lawburrows see Morrow v. Neil, 1975 S.L.T. (Sh. Ct.) 65.
  3. Walker, Principles of Scottish Private Law, (2nd ed., 1975) 613.

Textiles v. Sun & Sand Agencies Ltd.<sup>1</sup> In this case registration was sought in England of a French judgment under the Foreign Judgments (Reciprocal Enforcement) Act of 1933. The judgment was principally for the payment of the purchase price for goods sold and delivered plus interest but, in addition, a sum of £. 10,000 had been awarded for "resistance abusive" (abusive opposition). This is "a head of damage which, in France, may be awarded where a defendant has unreasonably refused to pay a claim."<sup>2</sup> One of the defendant's arguments was that part of the judgment could not be registered as it was penal and that section 1(2)(b) of the act prohibited the registration of any sum payable "in respect of a fine or other penalty". The exact nature of this head of damage does not seem to have been clear to judges but all three judges in the Court of Appeal held that this award for "resistance abusive" was an award of compensatory damages and was consequently not a sum payable "in respect of a fine or other penalty."<sup>3</sup> However, Lord Denning, M.R., expressed the view that "[t]he word 'penalty' in the 1933 Act, means .... a sum payable to the state by way of punishment and not a sum payable to a private individual, even though it is payable by way of exemplary damages."<sup>4</sup>

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1. [1978] 2 All E.R. 339 (Q.B.D. and C.A.)

2. S.A. Consortium Textiles, *supra*, 343-344.

3. At 355, 359 and 362.

4. At 354-355.

Parker, J. in the court a quo considered that damages for "resistance abusive" were not "a fine" nor could they be described as an "other penalty". "They are no more a penalty of the type contemplated than is interest on damages or indeed exemplary damages. In my judgment the penalties referred to are those recoverable for some public wrong and not by an individual in a civil action for breach of a private right."<sup>1</sup>

It is submitted that this reasoning is faulty. If a distinction is to be drawn between decrees that are penal and those that are compensatory, then it must be the purpose of the decree that determines whether it is penal or compensatory and there is clearly a strong penal element in an award of exemplary damages.<sup>2</sup> The fact that the damages are recoverable by a private individual against another in respect of a private wrong does not mean that the damages are not penal.

To return to Huntington: two types of penal law as defined in this case can be distinguished. The one type is the foreign rule that is clearly "criminal" because it is recognised as part of the criminal law. It is applied in criminal proceedings in criminal courts and enforced by the application of penalties and processes recognised as those appropriate in criminal matters. The other type of penal rule is enforced in the civil courts of its country but the consequence of its infraction is punishment for anti-social conduct not compensation for the injured party. For such a law to be penal the sanction need not be invoked by

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1. At 347.

2. That this is so is conceded by all the judges in Drane v. Evangelou, supra.



the state nor exacted for its benefit provided that the individual "pursuer" can be viewed as acting in the interests of the community even where his motive may be self-enrichment as could well be the case with the common informer.

To continue with Huntington: The provisions of section 21 were not penal but gave "a civil remedy only to creditors whose rights the conduct of the company's officers may have been calculated to injure, and which is not enforceable by the State or the public".<sup>1</sup> "The provisions of section 21 are in striking contrast to the enactments of section 34, which inflicts a penalty of \$100 upon every director or officer of a corporation with limited liability who authorises or permits the omission of the word "limited" from its seal, official publications, or business documents. In that case, the penalty is recoverable "in the name of the people of the State of New York by the district attorney of the country which the principal office of such corporation is located, and the amounts recovered shall be paid over to the proper authorities for the support of the poor of such country".<sup>2</sup> This latter provision is thus clearly penal. The decision then was that section 21 was not penal and that the judgment founded

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1. At 159. This is a quotation from the judgement of Osler, J. in the Appeal Court.

2. At 158-159.

on it could be accorded recognition in Ontario.

In this case their Lordships were primarily concerned with defining the nature and scope of the rule on foreign penal laws and decrees. The reasons for its existence received scant attention. On this one is referred *inter alios*, to Story.<sup>1</sup> The rule is declared to be "international"<sup>2</sup> and to relate to "the law of nations".<sup>3</sup> It will be suggested later that this approach is crude and superficial. The fact that international law accords sovereignty to a state only over its own territory is, no doubt, good ground for holding that no state is obliged by law to apply the laws, penal or otherwise, of another state. However, the question is, not whether a state must apply foreign penal laws, but whether it should, in certain circumstances, apply them. In other words, the sovereignty argument begs the question.

There are a number of subsequent cases in which the approach in Huntington v. Attrill has been followed,<sup>4</sup> and some earlier cases too, illustrate the approach.<sup>5</sup>

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1. Huntington, at 155.

2. E.g., at 156.

3. E.g., at 156.

4. E.g., Attorney-General for Canada v. William Schulze and Co., (1901) 9 S.L.T. 4; Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K.B. 140; Schemmer v. Property Resources Ltd., [1975] Ch. 273.

5. E.g. Folliot v. Ogden, (1789) 3 Term Rep. 726; Wisconsin v. The Pelican Insurance Co., 127 U.S. (20 Davis) 265.

The prohibition extends to indirect enforcement,<sup>1</sup> and ancillary claims,<sup>2</sup> but the fact the penal laws will not be enforced does not mean that they are denied all recognition, and the early formulations of the rule are too wide.<sup>3</sup> Thus, for example, a contract void for illegality under the proper law will not be enforced, and this is so even where the law rendering the contract illegal is penal.<sup>4</sup> Then again penal laws will be recognised as having effect within the territory of their own state,<sup>5</sup> subject to them not being contrary to public policy.<sup>6</sup> Foreign Penal laws will not then be completely disregarded, but they will not be enforced extra-territorially in another state at the instance of their state or its representatives.

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1. Banco di Viscaya v. Don Alfonso de Bordon y Austria, supra; Folliot v. Ogden, supra.
  2. E.g., expenses: Attorney-General for Canada v. William Schulze and Co., supra. But civil compensation awarded in a criminal case is not considered a penalty: Raulin v. Fischer, [1911] 2 K.B. 43.
  3. See for example the dictum in Folliot v. Ogden, supra, referred to in North at 139.
  4. North, supra, at 139; Kahler v. Midland Bank Ltd., [1950] A.C. 24; Zivnostenska Banka National Corporation v. Frankman, [1950] A.C. 57; Re Claim of Helbert Wagg & Co. Ltd., [1956] Ch. 323; Oppenheimer v. Cattermole, [1976] A.C. 249.
  5. Luther v. Sagor, [1921] 3 K.B. 532; Princess Paley Olga v. Weisz, [1929] 1 K.B. 718.
  6. This is discussed later in this chapter.



An examination of the relevant cases discloses that the term "penal law" is not always used in the sense attributed to it in Huntington v. Attrill. In some cases a foreign law is designated penal where it is not "criminal" but where it penalises someone, that is, where it imposes some discriminatory or other unjust disability or incapacity on a person. No mention of this type of penal law is made in Huntington v. Attrill but they would appear, as Dicey and Morris suggest,<sup>1</sup> to belong to a separate category of penal laws. There are a substantial number of cases which illustrate this second type of penal law - a survey of these cases can be found in Dicey and Morris<sup>2</sup> - but there is almost no judicial recognition that a separate class of penal laws is involved. The only directly relevant judicial comments I have been able to find are those of Romer, J. in Frankfurter where he said, "It is true that the legislation in Decree Number 80 was not penal in the sense which was laid down by the Privy

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1. At 73. This distinction does not seem to be made in the other popular textbooks like North (Cheshire) and Graveson.
  2. At 73. The cases there dealt with do not include relevant cases in the field of expropriation. Those in this latter field are discussed later in this chapter. A number of cases not in the field of expropriation cited by Dicey and Morris in this context are of little or no relevance, e.g., Re Metcalfe's Trusts, (1864) 2 De G.J. & Sm. 122; Sottomayor v. De Barros, (No.2) (1879) 5 P.D. 94. Scott v. Attorney-General, (1885) 11 P.D. 128., is only relevant if one accepts the explanation of its effect in Warter, (1890) 15 P.D. 152 at 155, an explanation which, it is submitted, finds no support in Scott's case itself (See Dicey and Morris, 266). Then other cases cited, though illustrations of the principle in question, are considered to have been wrongly decided. Cases in this category are: Worms v. De Valdor, (1880) 49 J. Ch. 261; Re Selots Trusts, [1902] 1 Ch.488; Re Langley's Settlement, [1962] Ch. 541. On them see Morris, at 510 and 511. See too, Anton, at 283.

Council in the cases of Huntington v. Attrill ..... But confiscatory laws of this character though not strictly penal in the sense laid down by the Judicial Committee of the Privy Council, ..... , are regarded here in the same light as penal laws, as many cases show".<sup>1</sup> Dicey and Morris<sup>2</sup> suggest that discriminatory penal laws in contrast to criminal penal laws, are not enforced because it would be contrary to public policy in private international law matters to do so and it is to this group of penal laws that the quotation at the beginning of this chapter refers.

If these "penal laws" are not enforced because they are contrary to external public policy, as would appear to be the case, a clear distinction should be made between criminal penal laws and discriminatory penal laws. Indeed, the word "penal" could, with advantage, be avoided in the second type - they could simply be designated "discriminatory" and thus contrary to public policy. This would prevent confusion between the two types of penal laws, confusion which, as explained later in this chapter, can have unfortunate consequences.

A large group of cases relevant to this field of penal laws is that relating to confiscatory and other expropriatory forms<sup>3</sup> of foreign

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1. Frankfurter v. Exner (W.L.) Ltd., [1947] Ch. 629 at 636.

2. At 73. See too M. Mann, (1956) 42 Tr. Grotius Soc. 133 at 136 et seq.

3. Various types of expropriatory laws may be distinguished. See North, supra, at 139 and Morris, supra, at 332.

legislation. These cases will be considered here because, in many, foreign expropriatory legislation has been denied effect on the ground that it is penal. It is submitted that there are no private international law rules dealing specifically and exclusively with expropriatory laws, but that decisions in this field are based on wider rules such as those on penal laws.

A rule applicable to these expropriation cases is that foreign expropriatory rules will not be enforced extra-territorially because the acquisition and transfer of rights in property is a matter for the lex situs. Certain relatively recent cases<sup>1</sup> support this proposition and some support is to be found in older cases too.<sup>2</sup> However, such laws will be given internal effect,<sup>3</sup> provided they are not penal, in the discriminatory sense, or otherwise contrary to public policy.<sup>4</sup> Subsequent removal of the property doesn't affect vesting.<sup>5</sup> In one case extra-territorial effect

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1. E.g., Bank voor Handel en Scheepvaart N.V. v. Slatford, [1953] 1 Q.B. 248; Jabbour v. Custodian of Israeli Absentee Property, [1954] 1 All E.R. 145. See too, Dicey and Morris, at 526, 534, 558.
  2. E.g., Polliot, *supra*. This was the main ground for the decision in the judgment of Lord Kenyon in which Ashurst, J. concurred and it finds some slight support in the judgments of Grose, J. too. See also In re Russian Bank for Foreign Trade, [1933] Ch. 745 at 767.
  3. Luther, *supra*; Princess Paley Olga, *supra*; Helbert Wagg, *supra*, at 344 *et seq.*
  4. A/S Tallinna Laevauhisus, (1947) 80 Ll. L. Rep. 99 at 109 and 111; Jabbour, *supra*, at 157; Oppenheimer v. Cattermole [1976] A.C. 249. But see: Luther, *supra*; Princess Paley Olga, *supra*; Wolff v. Oxholm, (1817) 6 M. & S. 92.
  5. Jabbour, *supra*, at 152; Luther, *supra*; Princess Paley Olga, *supra*.



was given to legislation requisitioning ships on grounds of public policy,<sup>1</sup> but the circumstances were unusual and the case was not followed in a later case.<sup>2</sup> The application of this rule that rights in property are governed by the lex situs can be complicated by problems relating to the ascertainment of the situs of property,<sup>3</sup> and by the rule that a foreign government in possession, even illegally, cannot be impleaded.<sup>4</sup>

This rule that transfers of property are governed by the lex situs, subject to the limitations already mentioned, should suffice to settle questions of the effect of foreign expropriatory laws. However, other rules have been invoked in this context.<sup>5</sup> One rule applied, or referred to, in several cases<sup>6</sup> may be formulated as follows: Foreign expropriatory laws will not be enforced extra-territorially where it is not proved that they are intended to have such effect. This is re-inforced by the rule that

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1. Lorentzen, supra. This case was followed in O/Y Wasa Steamship Co. Ltd. v. Newspaper Pulp & Wood Export Ltd., (1949) 82 Ll. L.R. 936.
  2. Bank voor Handel en Scheepvaart N.V., supra.
  3. Morris, 333.
  4. North, 144. A good illustration of the application of this rule is provided by Government of the Republic of Spain v. National Bank of Scotland, 1939 S.C. 413.
  5. These are discussed in the following pages of this chapter. A further possible rule is discussed in Chapter 4 at p. 101.
  6. E.g. Lecouturier v. Rey [1910] A.C. 262 at 265 and 267; The Jupiter (no.3), [1927] P.122 and [1927] P.251. Lorentzen v. Lydden & Co. Ltd., [1942] 2 K.B. 202 at 215.

legislation is presumed not to be extra-territorial in operation.<sup>1</sup>

This main rule is unnecessary in view of the rule that transfers of property are governed by the lex situs. Under this rule expropriatory legislation claiming external operation can never have such effect. The main rule's use is also contrary to the generally accepted approach of our system to the solution of conflicts. The usual approach to such problems is to characterise the matter in dispute and then to ascertain the lex causae by the application of the choice of law rule to which juridical category selected as appropriate belongs. Whether property has been expropriated or not should, if one adopts this approach, be characterised as a matter of the transfer of property, governed by the lex situs at the relevant time. The lex situs should be then applied to the problem but subject to the rules of the lex fori that exclude otherwise applicable rules of the lex causae. Here the process is being short-circuited by the court holding that no extra-territorial effect can be given to a foreign law that does not claim to have such an effect. This is a very different approach to conflicts of laws problems and other examples of it are not common.<sup>2</sup> Indeed, it is far from generally

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1. Jabbour (F & K) v. Custodian of Israeli Absentee Property, [1954] 1 All E.R. 145 at 150 and the authorities there cited. The existence and strength of this presumption should however, surely be a matter for the lex causae?
  2. In Municipal Council of Sydney v. Bull, [1909] 1 K.B. 7 it was held that an alternative ground for refusing to enforce a foreign revenue law was that the legislation on which the claim was based did not envisage extra-territorial enforcement of the claim. See also Mount Albert Borough Council v. Australasian Temperance etc. Society, [1938] A.C. 224.

established that a foreign lex causae will not be applied because it considers itself inapplicable. Some support for this approach is, however, found in the English 'foreign court' theory and other theories allowing renvoi. In terms of these the fact that the indicated foreign system considers itself inapplicable and refers the matter to some other system may be accepted by the forum. Another analogous approach is to be found in the use, in America, of the idea of 'false conflicts'.<sup>1</sup> The approach here is that it may be found, on an examination of the policy behind the relevant rules of the competing systems, that one of the systems has no interest in governing the matter and that the other system's rules should consequently be applied. However, this seemingly simple solution to some conflict problems raises serious difficulties.

A further rule, and the one of considerable relevance in this context, is that foreign expropriatory rules will not be enforced where they are penal. A survey of the cases shows that both types of penal cases, the Huntington type and the discriminatory type, are to be found. Each type will be considered separately but first, two general points. A great many of these cases could have been decided on the basis of rule that the acquisition and transmission of rights in property is a matter for the lex situs.<sup>2</sup> However, they were not. Then, although the distinction can be

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1. Morris, 542-546.

2. See e.g. Banco di Vizcaya, supra; Government of the Republic of Spain, supra; Frankfurter, supra; Novello & Co. v. Hinrichsen Edition Ltd., [1951] Ch. 1026.

595 and



made between these two types of penal cases in this field, it has already been pointed out that the distinction is rarely made in the cases themselves.<sup>1</sup> Indeed, the two types are treated as one, and as will be seen later, the rule on penal laws is stated in cases on discriminatory laws in a form only appropriate where the foreign law in question is penal in the Huntington sense.

A foreign expropriatory rule will not be enforced where it is penal in the Huntington sense. The obvious example is the case Banco di Viscaya v. Don Alfonso de Borbon y Austria.<sup>2</sup> However, as already noted, it will not be denied all recognition unless perhaps it is penal in the other sense or in some other way contrary to public policy.

A foreign expropriatory law will not be recognised where it is penal in the sense of being discriminatory.<sup>3</sup> Views on the characteristics which make an expropriatory rule penal in this sense have changed with the years and consequently there is some conflict in the authorities.<sup>4</sup> Where an

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1. Morris, 367.

2. [1935] 1 K.B. 140. Folliot, supra, can be explained on this basis in that <sup>the</sup> penal law there considered authorized confiscation of property for treason.

3. Wolff, supra; In re Fried Krupp A/G, [1917] 2 Ch. 188; Government of the Republic of Spain, supra; Lorentzen, supra; Frankfurter, supra; Novello & Co., supra; The Rose Mary, [1953] 1 W.L.R. 246, as explained by Upjohn, J. in Re Helbert Wagg and Co. Ltd's Claim, [1956] Ch. 323 at 346 - see Morris, 366; Jabbour, supra; Helbert Wagg, supra.

4. In some cases it was suggested that expropriation without compensation, or expropriation of foreigners' property without compensation, was penal in the discriminatory sense. But see Helbert Wagg, supra, at 347 and 349.

expropriatory law is penal in this sense it is sometimes designated "confiscatory".<sup>1</sup> This rule is thought to be based on public policy and this finds some support in a dictum of Lord MacDermott in Kahler<sup>2</sup> to the effect that expropriatory rules will not be recognised if they are contrary to public policy. If this is the true basis of these cases, then for them the rule should not be stated in an extra-territorial form as a foreign rule contrary to public policy will generally be denied all recognition, not only extra-territorial effect.<sup>3</sup> However, as mentioned earlier, there is a tendency to confuse this type of penal case with the Huntington sort and thus to state the penal rule in "discriminatory" cases in the extra-territorial form and to found it on sovereignty and international law theories of territoriality.<sup>4</sup> This misunderstanding of the double nature of the penal rule and the essential differences in the policy behind the two applications of the rule could result in bad decisions.<sup>5</sup>

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1. Lorentzen, supra; Novello & Co., supra; The Rose Mary, supra; Kahler v. Midland Bank, [1950] A.C. 24 at 46; Jabbour, supra, at 157.

2. At 43-44.

3. This is subject to the "contacts approach" discussed in the chapter on public policy.

4. See, for example, Lord Justice-Clerk Aitchison in Government of the Republic of Spain, supra, at 426. See also Frankfurter, supra, at 636-7 and 644.

5. M. Mann, (1956) 42 Tr. Grotius Soc. 133 at 137, et seq.

Are these rules on foreign penal laws satisfactory? As regards the discriminatory type of law, it has already been suggested that confusion can result from the designation of these as being "penal" and that it would be better to refuse to apply them as being contrary to external public policy. Subject to this, the basic approach to this type of penal case seems sound, although, as already noted, individual decisions may be questioned on their facts.

As regards the Huntington type of penal rule, a substantial list of reasons justifying the refusal to enforce such a rule extra-territorially can be given.<sup>1</sup> In the cases, however, judicial authority for the exclusion is usually reviewed without any real considerations of the policy behind it. The main reason given in the cases for excluding these rules is based on the territoriality argument which has, with the other reasons suggested, been considered at some length in the chapter of this work dealing with foreign revenue laws. These matters are not dealt with here because the problems raised by the non-application of foreign penal laws of a criminal nature have been solved, to a substantial extent, by other techniques. Thus a foreign criminal may be extradicted or refused entry or deported, while legislation may

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1. See Stoel, "The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States", 1967 (66) I.C.L.Q. 663 at 668.



provide that a citizen who commits a serious crime abroad may be prosecuted for it in his own country and under its criminal law.<sup>1</sup> It may be said that, if these other techniques were not available, the rule denying effect to foreign penal laws could not be maintained.<sup>2</sup>

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1. See, for example, section 6 of the Criminal Procedure (Scotland) Act 1975.
  2. Leflar, "Extra-state Enforcement of Penal and Governmental Claims", (1932) 46 Harv. L.R. 193 at 201.

## CHAPTER 4

## GENERALISATION OF THE RULES ON PENAL AND REVENUE LAWS

".... to present revenue laws, criminal laws, "political laws", or public law in general as categories comparable to those where a foreign rule of law, applicable in principle under the choice of law rules of the forum, is excluded because it is found incompatible with the "fundamental policy" of the forum is hardly logical. Firstly, the legislation in every country includes tax laws, laws embodying currency restrictions, "lois de police", penal codes, etc. These public law rules are certainly looked upon by most governments as justifiable and decent and part of the "fundamental policy" of any civilized country, even if often disliked by at least some of its citizens. If similar foreign laws or legal rules are not being applied, the reasons must be other than those evoked in support of ordre public".<sup>1</sup>

In the first chapter we saw that it has been claimed that the rules on foreign revenue and penal laws, the rules denying them extra-territorial effect, and certain other rules in the Conflict of

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1. Hilding Eek, (1973) II Hague Recueil 25.

Laws, are crystallisations of the public policy rule, that is the rule denying application to foreign laws contrary to external public policy.<sup>1</sup> However, a rather different picture emerges from our examination of these two rules in the last two chapters. It cannot be said that many foreign revenue or penal laws are contrary to external public policy, the forum has similar bodies of law often with many similar if not identical rules, why then are these foreign laws excluded? The short answer is that our courts have decided, for policy and other reasons, in general to enforce foreign law only in private law matters and to exclude certain foreign laws in the public law sphere from enforcement unless otherwise instructed by the government usually through legislation. As we have seen in the previous two chapters, especially as regards revenue laws, a number of separate factors have contributed to this widely adopted approach and it is not intended to review them again here at any length.

As regards the rule on foreign revenue laws, we saw that, although external public policy had played a vital role in the rule's creation, it cannot be said to be a significant factor in the rule's continued existence, though those who accept the sophisticated form

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1. See p. 6, supra.



of the public policy argument as propounded by Judge Learned Hand, among others, will consider that it is still of substantial importance in this context.

The rule on foreign penal laws again cannot be said to be based on the external public rule, but some confusion has been caused in this regard by the courts sometimes designating foreign laws, contrary to external public policy, as "penal" in the sense that they discriminate unjustly against some person or group of persons. But if one discounts this group of penal laws, improperly so called, the objection to the enforcement of foreign penal laws, like foreign revenue laws, is not that they are contrary to external public policy, but that they fall within a sphere where the courts do not apply foreign laws unless instructed by their governments so to do. The enforcement of foreign law is generally an extraordinary practice of sophisticated legal systems and the courts move cautiously in this field. They see dangers and problems in the external enforcement of foreign penal and revenue laws. Thus they only do this where so instructed by the government. In the penal sphere, and to a lesser degree in the revenue field, governments have acted in various ways to fill the resulting gaps.<sup>1</sup>

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1. See pp. 57 and 94.

A question this raises is the following: What is the extent of this field in which the courts do not intrude save at the instance of the government or legislature? Or, to put the question in more specific form: Can the rules on the non-enforcement of foreign revenue and penal laws and certain other like rules be generalised, as is averred in Dicey and Morris<sup>1</sup> into a rule that our courts will not enforce, either directly or indirectly, a public law of a foreign state? Such a general rule would appear to prevail on the Continent but is it part of the law of Scotland and England?

A full answer to this question would be a very lengthy task and it will not be attempted here. F.A. Mann has written at some length, and in some depth, on this matter.<sup>2</sup> He argues strongly for generalisation. However, there are some difficulties with generalisation and it is on these that I would like to dwell shortly.

Two points should be noted to place this matter in perspective. The first is that, although the courts will not enforce foreign public laws or, more accurately, certain categories of foreign public laws,

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1. Dicey and Morris, The Conflict of Laws, (9th ed., 1973) 75, Rule 3.
  2. 'Prerogative Rights of Foreign States and the Conflict of Laws', (1954) 40 Tr. Grotius Society, 25; 'Conflict of Laws and Public Law', (1971) I Hague Recueil, 107-196.

they are not denied all effect. It is said that they can be "applied" in suitable circumstances even though they cannot be "enforced". More of this later.

The second point, and one made earlier, is that the courts' refusal to enforce these groups of foreign public laws is, of course, subject to legislation to the contrary - they will enforce such laws if instructed to do so by the government, in appropriate form, usually by legislation. The courts are not saying that all of these laws should not be enforced, merely that it is up to the government to decide which of these rules should be so treated and then to give effect, in appropriate form, to such a decision. As F.A. Mann points out, the government, but not the courts, has the opportunity of making reciprocal arrangements for enforcement with foreign states.<sup>1</sup>

I submit that one should proceed with caution in the matter of generalisation in this field - generalisation may be premature or, indeed, unnecessary and undesirable. It should be noted that it is writers who support generalisation and not the judges.<sup>2</sup> It is true,

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1. Mann (1971), 168.

2. Rule 3 from Dicey and Morris was quoted by Goff, L.J. in S.A. Consortium General Textiles v. Sun & Sand Agencies Ltd., [1978] 2 All E.R. 339 at 359 (C.A.) who is apparently of the view that it is declaratory of the common law. However, the question of generalisation was not in issue, the point in dispute concerned foreign penal laws and it was in this context that the rule was quoted.



however, that reasons sometimes given by judges for the non-enforcement of foreign revenue and penal laws are capable of a much wider application.<sup>1</sup>

There are, I would suggest, too few individual rules to justify such a generalisation and too many rules or cases that would not be consistent with it. The rules on foreign revenue and penal may be suitable material for generalisation but there are few other rules capable of assimilation. The most important of such other rules, according to Dicey and Morris, are those relating to expropriation of property by foreign governments.<sup>2</sup> One could adopt the approach that such expropriatory laws are not enforced because they are public laws, but it is unnecessary to have this generalised rule for this purpose for, as we saw in the last chapter, other adequate rules already exist to deal with foreign expropriatory laws the most widely applicable, in my view, being the rule that questions concerning the ownership of property are referable to the lex situs at the relevant time. The acceptance of a general rule on foreign public laws would not cause this rule on ownership to disappear - it deals with all sorts of transfers of property, not only transfers on expropriation.

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1. See F.A. Mann (1971), 166-169. Of particular relevance here is the sovereignty argument discussed in this work at pp. 49 - 50.

2. At 79-80.  
See also F.A. Mann (1954), 35-37 and (1971), 172.

The few further examples of recognised categories of unenforceable public laws given in Dicey and Morris are import and export regulations, trading with the enemy legislation, price control regulations and anti-trust legislation.<sup>1</sup> No cases are cited in Dicey and Morris on the last two categories but F.A. Mann<sup>2</sup> gives as authority for the latter of these two, the case of British Nylon Spinners v. Imperial Chemical Industries.<sup>3</sup> As regards trading with the enemy legislation, it is conceded in a footnote in Dicey and Morris that there is important authority inconsistent with this proposition<sup>4</sup> and Mann considers that this category must, on present authority, be excluded.<sup>5</sup> The category of foreign import and export regulations also gives difficulty. Here two important cases which ostensibly do not support the proposition have to be distinguished though my view is that this can legitimately be done.<sup>6</sup> Further, the case most frequently cited in support of this

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1. At 79.

2. Mann (1971), 172.

3. [1953] Ch. 19. The later [1955] Ch. 37 report is not referred to by Mann.

4. Footnote 8 on page 79.

5. Mann (1971), 172. See also Mann (1954), 40-42.

6. Dicey and Morris, 79. The cases are Foster v. Driscoll, [1929] 1 K.B. 470 (C.A.) and Regazzoni v. K.C. Sethia (1944) Ltd., [1958] A.C. 301 (H.L.).

category<sup>1</sup> King of Italy v. De Medici<sup>2</sup> provides little authority for it.<sup>3</sup>

Dicey and Morris contrasts with foreign revenue laws certain foreign laws that "do not provide for the collection of money but merely for the protection of its value" and which are enforceable. Listed are exchange control regulations, moratorium laws and rules abrogating gold clauses.<sup>4</sup> Why these should be exempt from the general rule on the unenforceability of foreign public laws is not made clear in Dicey and Morris.<sup>5</sup> No doubt in all these categories we are concerned with their civil aspects and not with their criminal.

1. See Mann (1971), 172 and Mann (1954), 34.
2. (1918) 34 T.L.R. 623. Dicey and Morris at 79 also cites King of the Hellenes v. Brostrom, (1923) 6 Ll.L.Rep. 167, 190 as support for this category.
3. In this case Peterson, J. was asked to grant an injunction prohibiting the disposal, pending the trial action, of documents removed from Italy in contravention of an Italian law directed at the protection of documents of historical importance. All that the judge is reported as saying on this matter was the following: "The question arose whether there was any probability, at the trial of the action, that these documents, apart from the State papers, would be ordered to be returned to Italy. He did not think that the Court would undertake such a burden". The State papers were in a different category because they belonged to the Italian State.
4. Dicey and Morris, 78.
5. F.A. Mann (1971), 172 list foreign exchange control legislation as unenforceable without referring, in this context, to Kahler v. Midland Bank, [1950] A.C. 24, a case he had considered in his 1954 lecture at 39-40 as creating difficulties in this regard.



F.A. Mann concedes that there are a number of cases difficult or impossible to assimilate, that is, to bring within the generalised rule.<sup>1</sup> Those in the fields of foreign trading with the enemy legislation and one concerned with foreign exchange control regulations have already been mentioned but there are two cases in a further two fields that are viewed by Mann as problem cases. One of these cases is Emperor of Austria v. Day and Kossuth,<sup>2</sup> which is about foreign monetary laws, while the other is Re Maldonado;<sup>3</sup> it deals with the right of the State to take as ultimate heir.

Whenever generalisation of a broad field of law is attempted, cases will inevitably be found that are out of step, that cannot be assimilated, but it is all a question of degree. In this field of foreign public laws, I would suggest, to repeat myself, that there are too few individual rules like the foreign penal and revenue rules to justify generalisation in this very broad field of foreign public laws and too many rules or cases that would be inconsistent with it.

We have already noted that the various categories of foreign public laws which are denied enforcement are not refused all recognition.

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1. Mann (1971), 172 and (1954), 37-45.

2. (1861) 3 De G.F. & J. 217. Mann (1971), 172 and (1954), 37-39.

3. [1954] P. 223. Mann (1971), 172 and (1954), 42-44.

The accepted terminology is that they may still be "applied" in appropriate circumstances though they will not be "enforced" directly or indirectly. Thus a foreign expropriatory rule will be applied where it is part of the lex situs but will not be enforced abroad. Again, although a foreign revenue or penal claim will not be enforced extra-territorially, a foreign contract will be treated as void by our courts if it is so rendered by a revenue or penal provision of the foreign proper law. We have also seen in the field of revenue laws that the task of distinguishing application from enforcement, particularly indirect enforcement, has proved a difficult one. Thus, for instance, those not versed in this field but told of the rule on the non-enforcement of foreign revenue laws must wonder at the decisions in cases like Scottish National Orchestra Society Ltd. v. Thomson's Executor,<sup>1</sup> and Re Lord Cable (deceased),<sup>2</sup> not that I suggest these cases were not correctly decided.<sup>3</sup> The borderlines between enforcement and application in the various categories of foreign public laws are not yet clearly defined and generalisation of all the categories into one may be unwise at this stage. There is a wide diversity among foreign rules that could be characterised as public and it may be that different considerations will govern the drawing of the line between enforcement

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1. 1969 S.L.T. 325. See p. 44 , infra.

2. [1976] 3 All E.R. 417 (C.A.). See p. 45 , infra.

3. Two other interesting similar cases gleaned from Dicey and Morris are Re Hollins, 139 N.Y.S. 713 (1913), 106 N.E. 1034 (1914) and Re Reid, (1970) 17 D.L.R. (3d.) 199.

and application in the diverse categories of public laws resulting in differing lines being drawn in different categories.

We have seen that considerable difficulties can arise in the characterisation of revenue and penal laws. The adoption of the generalised rule on foreign public laws would require even more difficult characterisations, those of public laws and the contrasting category of private laws. Although the basic ideas central to these two contrasting concepts of public and private law may be easy to grasp in the abstract, there are wide areas of uncertainty and ambiguity between them making characterisations difficult. This is particularly true in present times with the erosion of the distinction between public and private law resulting from the constant expansion of state intervention in once purely private law matters for reasons of consumer protection, security of employment, building control and the like.

A broad general rule based on theories of sovereignty rather than on practical considerations may be intellectually satisfying to some, but it does not guarantee sensible decisions in individual cases. I would suggest that generalisation in this very wide field should be avoided not so much because it is premature but because subsequent developments may well show it to be undesirable and that this field should be covered by a number of separate rules differing in their scope and field of application.



## CHAPTER 5

EXTERNAL PUBLIC POLICY AND THE FIELD  
OF OPERATION OF LAWS

"Contracts contrary to Acts of Parliament. It has never been held that an Act of Parliament is capable of yielding a principle of public policy which an English court would have to apply to a contract not governed by English law, unless the case was within the express terms of the statute. The extensive application of common law principles of public policy to cases not otherwise subject to English law has not been accorded even to such statutes as might have been held to express fundamental principles of justice and morality. This has led to remarkable results. A contract for the sale of slaves governed by the law of Brazil was held to be enforceable in England, the prohibition against slave trading being embodied in a statute, while contracts in restraint of trade and champertous contracts were considered as contrary to universal justice. Why should a principle of morality have the power to invalidate a foreign contract if it happens to have been formulated by judges, but not if it was formulated by Parliament?"<sup>1</sup>

How does one determine the field of operation of a law? In the case of a common law rule,<sup>2</sup> it will generally be assumed that it is to have the sphere of operation designated by the relevant choice of law rule. Thus a Scottish common law rule on intestate succession to moveables will

1. Dicey and Morris, The Conflict of Laws (9th ed., 1973) 753. The words are those of Kahn-Freund and have not changed since they first appeared; that was in the 6th ed. (1949) of the above work at 607-608. He has expressed the same views more fully in his article, "Reflections on Public Policy in the English Conflict of Laws", in (1954) 39 Tr. Grotius Soc. 39. A more recent summary of his views on public policy in Conflict of Laws is to be found in Kahn-Freund, General Problems of Private International Law (1976) especially at 280-285. This work will be cited as "Kahn-Freund, General Problems", to distinguish it from the 1954 article.
2. The expression "common law rule" is used to mean a judge-made rule of law as opposed to a legislative provision.

be presumed to apply to all cases in which the intestate died domiciled in Scotland. It will be assumed that the choice of law rule and the related internal rules of law will be in harmony with, and will complement, each other. Thus a judge-made choice of law rule performs two closely linked functions - it indicates the system of law applicable to a particular category of cases and it delimits the field of application of the internal common law rules of the *lex fori* falling within that category. But what about a legislative provision? Thus, should there be a legislative change in the Scots law on the domicile of married women, to which wives will the new provisions apply? To all wives in Scotland, to all wives domiciled in Scotland or to all wives wherever they may be? Again if a Scottish legislative provision renders certain gambling contracts null and void, does this apply to all such contracts entered into in Scotland, to all such contracts in respect of which Scots law is the proper law or to all such contracts that are sued on in the Scottish courts?; to name several of the possible fields of application. In the case of some legislative provisions the field of operation is expressly defined, there is a particular "choice of law clause".<sup>1</sup> Thus, for example, section 1 of the Legitimation (Scotland) Act 1968, which

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1. On these clauses see Dicey and Morris, 754; Morris, (1946) 62 L.Q.R. 170; and Unger, (1967) 83 L.Q.R. 427; F.A. Mann, (1972-3) 46 B.Y.B.I.L. 117.

deals with legitimation by subsequent marriage, specifically states that the provisions of the section only apply where "the father of the said person is domiciled in Scotland at the date of the marriage".<sup>1</sup> However, in many instances, legislative provisions are silent as to their sphere of operation. An example of such a provision is provided by section 21 of the Betting and Lotteries Act 1934 which read: "Subject to the provisions of this Part of this Act, all lotteries are unlawful".<sup>2</sup> This section did not render lotteries criminal, the related criminal offences were to be found in section 22.<sup>3</sup> What then was the sphere

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1. The bill initially contained, in clause 5, a general choice of law provision referring this matter of legitimation by subsequent marriage to the law of the father's domicile at marriage, a law thought to express the common law on this matter. That this is the rule has since been confirmed by the decision in Kelly v. Marks, 1974 S.L.T. 118 at 120. However, this provision was subsequently omitted from the enactment, it being hoped that a wider rule might be developed by the courts adopting the type of approach favoured in Indyka v. Indyka [1969] 1 A.C. 33. In view of the particular choice of law provision in the act using domicile of the father as the connecting factor, this seems unlikely and it would appear that the need for consistency between particular choice of law provisions and the general choice of law rule was not appreciated. (See, on all of this, the commentary to section 5 of the act in the Scottish Current Law Statutes.) I might add that section 5 has been misunderstood by the Lord Lyon in Viscount Drumlanrig's Tutor, Petitioner, 1977 S.L.T. (Lyon Ct.) 16 at 17, who sees it as, *inter alia*, a general choice of law provision enacting that "a person legitimated under the law of another country by the subsequent marriage of his parents will be treated as legitimate for the purposes of the Act."
  2. The section is now repealed. The current equivalent is s.41 of the Betting, Gaming and Lotteries Act 1963.
  3. See, now, s.42 of the 1963 Act.



of operation of this legislative provision? It applied to Great Britain,<sup>1</sup> but did it apply only to lotteries held in Great Britain, or to lottery contracts where the proper law was that of Scotland or England, or to all lotteries, wherever held, the subject of litigation in Great Britain?<sup>2</sup> This question came up for decision before the First Division of the Court of Session in Clayton v. Clayton<sup>3</sup> where the relevant lottery was held in Eire. The majority ruled in effect that the provision applied only to lotteries in Great Britain. Lord President Normand held that "the locus of the lottery in this case was outside the territory which is subject to the British Parliament, and this was, therefore, a lottery which the British Parliament could not declare either lawful or unlawful".<sup>4</sup> Lord Moncrieff was of the same view. Referring to section 21 he ruled that "Such an enactment, by reason of the limits of the jurisdiction of Parliament can apply only to lotteries carried on within the realm".<sup>5</sup>

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1. See s. 33(3).

2. These are some, not all, of the possible spheres of operation.

3. 1937 S.C. 619. See too Duncan v. Motherwell Bridge and Engineering Co. Ltd., 1952 S.C. 131 at 135.

4. At 628.

5. At 630. Lord Morison considered that the section applied to all lotteries whether held in Great Britain or elsewhere - see 629-630.

Clayton's case is cited by Anton<sup>1</sup> as illustrative of the important presumption that United Kingdom statutes apply only to conduct within the United Kingdom - the territoriality principle.<sup>2</sup> Anton's general formulation is the following: "The courts start from a presumption that statutes are not intended to apply to persons, conduct or property outwith the United Kingdom."<sup>3</sup> He adds: "The presumption is a common-sense one. Quite often statutes by their literal terms would apply to conduct anywhere".<sup>4</sup> The same view is expressed in Dicey and Morris where, in the context of contract, it is said: "If the statute is silent, the general rule of interpretation comes into play, according to which an English statute is not to be deemed to have any extraterritorial operation, unless such operation is required by the express terms of the Act or by its "object, subject-matter or history".<sup>5</sup>

Clearly some presumption is necessary to deal with such cases, but

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1. Anton, Private International Law (1967) 76.
  2. On the vagueness of this principle, see Kahn-Freund, op. cit. supra, at 60-61.
  3. Anton, at 75.
  4. Anton, at 76.
  5. Dicey and Morris, op. cit. supra, 754.

it must be doubted whether the vague territoriality principle is appropriate in this regard at least where private law statutory provisions are concerned. Surely the appropriate rebuttable presumption, stated in the Scottish context, is that Scottish legislative provisions are part of Scots law and apply where Scots law is the system indicated as appropriate by Scottish choice of law rules. In other words, the same basic approach should be adopted to the ascertainment of the field of operation of legislative provisions as is adopted to the performance of this task in respect of common law rules. Kahn-Freund has argued very persuasively for this approach<sup>1</sup> and there is some judicial authority for it.<sup>2</sup> On this approach, it would be assumed, for example that a Scottish statutory provision on the age at which capacity to marry is acquired would apply to all marriages in Scotland and to all marriages outwith

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1. Kahn-Freund at 40, 59 and 60-65.

2. See, for example, two cases discussed later in this chapter at pp. 129-132: Saxby v. Fulton, 1909 2 K.B. 208, 226 and Schrichard v. Lacon, (1906) 22 T.L.R. 245. A relevant Scottish case is English v. Donnelly, 1958 S.C. 494. See too Dicey and Morris, 755, footnotes 30, 31 and 32.

The unwise practice of formulating applicability provisions in territorial terms supports the unsatisfactory territorial approach. It would, for instance, generally, be better to state that an enactment is part of Scots law rather than to declare that it applies to Scotland.



Scotland of persons domiciled in Scotland.<sup>1</sup> This is because the Scottish choice of law rule on capacity to marry invokes two systems, the lex domicilii and the lex loci celebrationis.<sup>2</sup> Then a statute on domicile would be presumed to apply to all questions of the domicile of a person that come up in Scottish litigation wherever that person is resident or domiciled. This is because the interpretation of the connecting factor domicile is a matter for the lex fori, in this context, Scots law.<sup>3</sup> Again a Scottish legislative provision on "legal rights"<sup>4</sup>

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1. In fact there is no need to rely on a presumption in this case as the current statutory provision on the age of marriage specifically designates its sphere of operation. This provision, s.1 of the Marriage (Scotland) Act 1977, reads as follows:  
 "1 (1) No person domiciled in Scotland may marry before he attains the age of 16.  
 (2) A marriage solemnised in Scotland between persons either of whom is under the age of 16 shall be void."
2. Anton, op. cit. supra, 276-283; Clive and Wilson, The Law of Husband and Wife in Scotland (1974) 158. Both these works predate the Marriage (Scotland) Act, 1977.
3. Anton, at 162-3. This is subject to minor exceptions. Thus the forum may allow transmission or remission (renvoi) and there may be legislative exceptions like that created by s.5 of the Recognition of Divorces and Legal Separations Act 1971.
4. Legal rights in the succession context in Scots Law are rights of succession indefeasible by the deceased's mortis causa disposition. See Anton, at 505.

on death over moveables would be presumed to apply to all moveable property, wherever situated, of a Scottish domiciliary the relevant choice of law rule requiring the application of the lex ultimi domicilii. Then, because of the "double delict rule",<sup>1</sup> a Scottish legislative provision on delict would be presumed to apply to all delict cases coming before the Scottish courts and not just to all delicts committed in Scotland.

The position as regards the designation of the scope of legislative provisions on contract is rather complicated. Here one would expect the courts to assume, in the absence of clear evidence to the contrary, that a Scottish legislative provision was intended to apply to all contracts governed by Scots law, this being determined by the application as the relevant Scottish choice of law rules. However, the territoriality approach has been adopted in respect of certain categories of contract enactments. The position in this regard is set out in Dicey and Morris<sup>2</sup> and I will not repeat here what is said there. I believe that this territoriality approach to the scope of statutory provisions on contract,

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1. In Scots law the choice of law rule for delict requires civil actionability under both the lex fori and the lex loci delicti commissi. See McElroy v. McAllister, 1949 S.C. 110; Mitchell v. McCulloch, 1976 S.L.T. 2.

2. At 755-6.

as illustrated in cases like Clayton v. Clayton<sup>1</sup> and English v. Donnelly<sup>2</sup> is founded, to a large extent, on a misunderstanding of the choice of law rules relating to contract. The misapprehension is that contract is a field governed by the proper law and that the parties are free to select a proper law. Thus, if legislative provisions on contract, other than non-mandatory provisions, were to be applied only where Scots law was the proper law, then these provisions could easily be avoided by the parties selecting some other system as the proper law.<sup>3</sup> However, the view that the selected proper law governs in contract is not true; this proposition is subject to a number of important exceptions, two of which we will now examine.<sup>4</sup>

Although there is no real doubt that the first of these exists, its exact scope and nature still awaits judicial definition. On this exception Dicey and Morris have this to say in the context of legality

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1. 1937 S.C. 619.

2. 1958 S.C. 494.

3. This approach is well illustrated by the judgment of Lord President Clyde in English v. Donnelly, at 494.

4. Another one is that not all matters in the field of contract are governed by the proper law. Capacity to contract, for instance, is probably governed by the lex loci contractus - see Anton, 199-202.



of the contract:

"At first sight the rule that the legality of a contract is determined by its proper law, appears to lead to the startling and quite intolerable result that it is in the power of the parties by a choice of law to give validity to an agreement which, but for such choice, would have been illegal and void. The theory that the parties, by choosing a proper law other than the law most closely connected with the contract, can contract out of the mandatory provisions of that law, has met with the objection that it opens the door to law evasion and to the frustration of attempts to unify the substantive commercial law. In fact, however, it is submitted that these results do not follow. In the first place they can be avoided by a bold and judicious application of the doctrine of evasion, indicated by Lord Wright. As was pointed out above, a choice of law will be disregarded if it is not bona fide, i.e. if it was prompted by the intention to evade any provisions of the legal system most closely connected with the contract which would have rendered the contract illegal."

The second relevant exception, an obvious one but less important than the previous one, expressed in the Scottish context, is that the Scottish courts will treat as illegal a contract that requires a performance in Scotland illegal by Scots law.<sup>2</sup> This is a separate rule though, in many, but not all, cases where there is to be performance in Scotland, Scots law will be the system with which the contract is most

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1. At 778-9. See also 728 (Rule 146, Sub Rule 1) and 730.

2. See Dicey and Morris, 756; Anton, 209. This is a much narrower rule than that, for which there is some authority, that a contract will be treated as illegal if it requires a performance illegal by the lex loci solutionis. See Dicey and Morris, 781. See too Anton, 214.

closely connected and the previous exception could well then apply.

If mandatory provisions on contract in enactments are presumed to have the scope of operation of the proper law subject to certain exceptions, basically the two set out above, then the possible dangers, previously mentioned, of interpreting contract enactments as being consistent with choice of law rules are overcome. However, as the first exception is not as clearly established or defined as one would wish and because of other difficulties, the consideration of which would take us too far from the subject of this chapter, it is probably better for legislation in the field of contract to contain specific choice of law provisions.<sup>1</sup>

In conclusion, then, on this point of ascertaining the scope of legislative provisions on contract where there is no choice of law clause, my submission is that these should be interpreted as applicable where the relevant choice of law rules so render them. Thus a Scottish legislative provision that "all lotteries are unlawful and void" would, it is tentatively submitted, be presumed to apply in the following circumstances:

(a) where Scots law is the proper law of the contract;

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1. A recent example of these is provided by s.27 of the Unfair Contract Terms Act 1977.

- (b) where a system other than Scots law is the system selected as the proper law, but Scots law would be the proper law objectively ascertained and the parties have chosen the other system in order to evade the mandatory provisions of Scots law;
- (c) where the contract is to be performed in Scotland.

It is submitted then that there should be a presumption that a legislative provision in the private law field, like a common law rule in that field, has the sphere of operation allocated to it by the appropriate choice of law rule. The presumption is rebuttable and the question arises whether public policy, particularly external public policy, has any roll to play in this regard.

In this context I wish first to examine the contention of Kahn-Freund that certain common law rules, such as the law against restraint of trade or that against trading with the enemy, have been given a wider scope of application than that indicated by the appropriate choice of law rule because these rules embody principles of external public policy.<sup>1</sup> There are thus, according to Kahn-Freund, two types of mandatory rules in the common law of England, those that must be applied by the English courts only where English law is the system designated as applicable by

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1. Kahn-Freund, at 40-42, 66; Dicey and Morris, 753 and 750-751.



English choice of law rules and those that must be given a wider sphere of application, they cannot yield to choice of law rules, because they are expressions of external public policy.

Examples of the first type of law are easily found,<sup>1</sup> but instances of the second type are rather rare. Kahn-Freund, in the article, gives only two examples of these rules which "have been held to yield an international public policy and thus to be stronger than the ordinary principles of conflict of laws",<sup>2</sup> namely, as we have already seen, the laws against trading with the enemy and against contracts in restraint of trade.<sup>3</sup> He gives as authority for this latter example the case of Rousillon<sup>4</sup> decided in 1880. The dictum of Fry, J. on which this submission is based is as follows:

"It has been insisted that, even if the contract was void by the law of England as against public policy, yet, inasmuch as the contract was made in France, it must be good here, because the law

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1. Kahn-Freund, at 41.

2. Kahn-Freund, at 42.

3. Kahn-Freund, at 40 and 42. From his views expressed in Dicey and Morris and in his General Problems at 283 it would seem that he considers the case of Grell v. Levy, a case on champertous contracts, dealt with in this chapter at p. 121, also to fall within this category.

4. Rousillon v. Rousillon, (1880) 14 Ch.D. 351.

of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this country. It appears to me, however, plain on general principles that this court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy, simply because it happens to have been made somewhere else."

Dicey and Morris, at pp. 749-750, support this interpretation of this dictum giving it as authority for the proposition that "contracts in restraint of trade and certain other contracts ..... have been held void by English courts although, on general principles of conflict of laws, these contracts were governed in each case by a foreign legal system according to which they would have been valid." But, at p.72, where an almost identical proposition is stated, also based on Rousillon, it is said of this case in the relevant footnote, "but the case does not amount to a decision on the point. Would the principle apply to a foreign contract in restraint of foreign trade?"<sup>2</sup> The point here is that the agreement, alleged to be in restraint of trade, although made in France, applied to trading in England (and also in certain other places) and it can be argued that all that the judge is saying is that the fact that an agreement in restraint of trade was made in France does not mean that certain of its provisions cannot be treated as void by an English court as being in restraint of trade in England and thus contrary to English

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1. Rousillon, at 369 quoted in Dicey and Morris, at 749.

2. This point is also made by Kahn-Freund in his General Problems 283, note 46.

domestic public policy. This case does not deal with external public policy but with internal public policy.<sup>1</sup>

This is rather like the position in respect of champertous contracts. In the 1864 case of Grell v. Levy<sup>2</sup> it was held that the English rule against such contracts applied to foreign contracts where the litigation was to take place in England. This English rule would, it seems, not apply to foreign champertous contracts not involving litigation in England.<sup>3</sup> It could perhaps be said that both these cases involve a rule of English law being given a wider scope of application than that designated by the relevant choice of law rule probably, at the time in question, that matters of contract are governed by the lex loci contractus. But, surely, we merely have here an application of the basic rule referred to earlier in this chapter, that the English courts will treat as illegal a contract that requires a performance in England illegal by English law. Consequently, I would suggest that the proposition in Dicey and Morris<sup>4</sup> to the effect that foreign contracts in restraint of trade and foreign champertous contracts have been held

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1. North, Cheshire's Private International Law (9 ed., 1974) 149; note 6. See too Kahn-Freund, 65, note 23.

2. (1864) 16 C.B. (N.S.) 73.

3. Dicey and Morris, 72, note 24.

4. At 753. (The proposition is contained in the quotation at the beginning of this chapter.)



to be unenforceable in England as being contrary to universal justice, is clearly wrong.

Kahn-Freund's other example, that a contract which involves trading by a British subject with an enemy alien is void, is a better one. In the case (Dynamit Aktien-Gesellschaft v. Rio Tinto Co. Ltd.<sup>1</sup>) which he cites as authority for this proposition Lord Atkinson commented that ".... the public policy of this country prohibits trading with the enemy by British subjects".<sup>2</sup> This rule can be viewed as a crystallisation of a particular application of the public policy rule into a specific law which operates both in the domestic and the international spheres. I might add that it would appear to be an independent rule and not merely an application or consequence of the procedural rule that an alien enemy may not sue in our courts.<sup>3</sup>

A more recent example of a rule of common law considered to express a rule of external public policy is to be found in the Southern Rhodesian case of Timms v. Nicol.<sup>4</sup> In this case Goldin, J. held that the Roman-Dutch common law rule that betting transactions are unenforceable applied

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1. 1918 A.C. 292 (H.L.).

2. At 299.

3. Dicey and Morris, 137.

4. (1968) 1 S.A. 299 (R).

to an action for the enforcement of a foreign betting contract valid under its proper law. He said:

"In the case before me the rule of Roman-Dutch law that gambling debts are not recoverable, is of an overriding nature and is based on a fundamental principle of public policy and is therefore applicable in all actions. No good reason exists for the contention that it should not apply to contracts entered into in another country."<sup>1</sup>

Goldin, J. did, however, point out that there was an alternative approach; the rule in question could be designated procedural and thus applicable in all cases brought in that forum.<sup>2</sup> He concluded:

"It is clear that I am concerned with a rule of procedure which makes wagering contracts unenforceable and this operates in respect of all contracts of this nature, irrespective of whether they were entered into in this country or in another country where such contracts are enforceable."<sup>3</sup>

The sentence from the quotation at the beginning of this chapter which reads, "The extensive application of common law principles of public policy to cases not otherwise subject to English law has not been accorded to even such statutes as might have been held to express fundamental principles of justice and morality."<sup>4</sup> seems to suggest that many common

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1. At 300.

2. At 300.

3. At 301.

4. This proposition has been convincingly criticised by F.A. Mann, (1972-3) 46 B.Y.B.I.L. 117 at 138.

law rules have been given a wide scope of application as they embody principles of external public policy, but this is incorrect, this approach is rarely adopted. In almost all cases where external public policy is involved, the question is not whether the local law should be applied because it embodies a principle of external public policy but whether a foreign law, invoked by a choice of law rule of the forum, is not to be applied because it offends against a principle of external public policy of the forum. Take for example a case in which the question whether a foreign contract allegedly induced by force and fear (duress) is valid has come up for decision as occurred in Kaufman v. Gerson.<sup>1</sup> Two approaches are possible.<sup>2</sup> The one approach is to say that our common law rules on force and fear only apply where Scots law is indicated as the appropriate system to govern the matter by our choice of law rules. Thus they would not apply where the contract, or purported contract, was governed by a foreign proper law. However, even if the contract is valid under the proper law, it may still be set aside as being contrary to the external public policy rule in that it was induced by force or fear. The other approach

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1. [1904] 1 K.B. 591.

2. A third possible approach put forward by Unger in the context of the interpretation of legislative rules is discussed later in this chapter. See



would be to say that our own rules on force and fear give expression to a principle of external public policy and must be given universal effect, that is, must be applied in all cases.

As we saw in the chapter on public policy, this second approach can only be adopted on rare occasions, most rules of our system cannot be said to embody principles of external public policy and many are surrounded by zones of tolerable deviation.<sup>1</sup> The first approach is the usual one and it has a number of important advantages over the second.

The main advantage of this first approach is that it retains the flexibility of the external public policy rule. In the second approach one is applying not the flexible doctrine of external public policy but a rule of law, albeit one embodying a principle of external public policy, that must be applied to all cases that fall within its ambit. All Kahn-Freund's objections to the crystallisation into individual laws of instances of the application of external public policy are applicable here.<sup>2</sup> Two aspects of the flexibility of the external public policy rule may be mentioned. These were considered in the chapter on public policy.

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1. See pp.14-16 of this work.

2. See p. 6 of this work.

The first is that the use of this rule is result-orientated, it is only used where the final outcome of the case requires it.<sup>1</sup> Then its use is said to depend on contacts, that is, the more weighty the links between the case and the country of the forum, the more likely the courts are to apply the external public policy rule.<sup>2</sup>

In the case of the second approach, there is also, of course, the difficulty of establishing that a rule of law embodies a principle of external public policy and is not just to be given the sphere of operation indicated by the appropriate choice of law rule.

Surely, then in all, or almost all, cases it would be better to use the common law rule as evidence of the principle of external public policy rather than as embodying it? The external public policy rule could then be applied, but only if appropriate in the peculiar circumstances of the particular case.

The same argument is, it is submitted, also valid where the law in question is legislative in origin. Unless it is obvious that the legislature intended a legislative provision to have some wider field of application, the provision should be given the sphere of operation

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1. See pp.24-25 of this work.

2. Another disadvantage of treating laws as embodying principles of external public policy, perhaps only likely to be present rarely, is that the chance of replacing the foreign lex causae with some rule other than that of the lex fori, is lost. See pp.36-39 of this work.

allocated to it by the appropriate choice of law rule of the forum. This would not preclude the provision being viewed as evidence by the court of a principle of external public policy. Thus enactments of limited scope directed against slavery could provide evidence of a general principle of external public policy against slavery.

If it was solely Kahn-Freund's contention that the English courts have, on occasions, been slow to use enactments as evidence of principles of external public policy,<sup>1</sup> one could agree with him, but he goes rather further than this. He argues that the court should ask about a statute, "does it apply either by reason of one of the normal rules of the conflict of laws or despite those rules by reason of public policy?"<sup>2</sup> In other words certain statutory provisions should, he considers, be given an extended scope of application because they embody principles of external public policy.<sup>3</sup> That this is his view is confirmed by his claim that there was, when he wrote, or, more accurately, spoke, only one English case "in which a statute was held to express a principle of public policy capable of application beyond the scope of wording."<sup>4</sup> The

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1. This reluctance is illustrated in cases dealt with by Kahn-Freund at 66-68.

2. At 66.

3. This is also the view of Unger, (1967) 83 L.Q.R. 427 at 431, 433 and 448.

4. At 40. This submission is made again in his General Principles, 283, note 51.



judgment in question is apparently that of Morton, J. in the case In re B.'s Settlement<sup>1</sup> in which the relevant statutory provision was section 1 of the Guardianship of Infants Act, 1925, which provided: "Where in any proceedings before any court the custody .... of an infant .... is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."<sup>2</sup> This provision, says Kahn-Freund, "was applied to a case concerning a foreign infant which, but for this provision, might have been governed by foreign law. This provision is an example of a statute which the courts are treating as ordre public international, but the wording almost compels them to do so."<sup>3</sup>

I can find nothing in the report of this case which suggests that the court, in interpreting this legislative provision, were doing any more than giving the words of the section their literal meaning. There is no question of giving the provision a field of application beyond the scope of its wording for reasons of public policy or for any other reasons. In any case, it can be argued that this decision is not inconsistent with what has been suggested is the correct approach to the determination of

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1. 1940 Ch. 54.

2. The English provision is now section 1 of the Guardianship of Minors Act, 1971.

3. At 69.

the scope of application of a statutory provision, that is, that such a provision should be presumed to have a sphere of operation consistent with the appropriate choice of law rule. Here it could be argued on the wording of the section that it is a procedural provision applicable wherever English law is the *lex fori*.

The quotation which introduces this chapter is followed by the sentence:

"The matter is one of continuing practical importance, because it is this different treatment of judicial and parliamentary legislation which serves as a justification for the refusal to give international force to Acts of Parliament dealing with gaming contracts and with money-lending."<sup>1</sup>

The case referred to in the context of gaming contracts is Saxby v. Fulton<sup>2</sup> in which it was held that English legislation forbidding the lending of money for gambling did not apply to loans made in another country, where gambling was not illegal, for gambling there. One ratio for this decision, that given by Kennedy, L.J. in the Court of Appeal, was that the legality of a contract was generally governed by the lex loci contractus and that the contract there in point was valid by that system, the law of Monaco.<sup>3</sup> This approach seems sound but in the quotation from

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1. Dicey and Morris, at 753. The words are again those of Kahn-Freund.

2. [1909] 2 K.B. 208, 226.

3. At 231.

Dicey and Morris it is claimed that these English legislative provisions should have been treated as embodying a principle of external public policy and applied to all cases of lending money for gambling. It had been submitted in Saxby<sup>1</sup> that even if the loan did not fall foul of the legislative provisions, it was contrary to public policy. On this Kennedy, L.J. had this to say:

"I entirely agree with Buckley, L.J.; the borrowing and lending of money for the purpose of gaming is neither immoral nor unlawful at common law. It is suggested that morality is advancing, and that this is evidenced so far as to create a public policy by statutes which have been passed for the purpose of making some gambling transactions unlawful; but the answer is that these statutes really shew that the policy of the Legislature is to deal in a disciplinary fashion with certain particular manifestations of the gambling spirit, and do not establish a public policy which is contravened by any transactions connected with betting or games of chance."<sup>2</sup>

This approach of Kennedy, L.J. seems sound. Where is the evidence that all transactions connected with gambling are contrary to public policy in England? Even if there was such a principle of public policy, it would seem that the legislation should be treated as evidence for it and not as embodying it. This was discussed earlier in this chapter.<sup>3</sup>

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1. At 217.

2. At 232.

3. See pp. 124 - 127.

F.A. Mann, op. cit. supra, at 138 also rejects this criticism in Dicey and Morris of Saxby v. Fulton.



The case referred to in the context of money-lending is Shrichard v. Lacon.<sup>1</sup> Here again the complaint is that the legislative provision in question should have been construed as expressing a principle of external public policy. In Shrichard the plaintiff company sued in England on a loan it had made to the defendant in India and the question arose whether the transaction could be reopened under section 1(1) of the Moneylenders Act, 1900, which provided for reopening "where proceedings are taken in any Court" by a moneylender for recovery of money lent.<sup>2</sup> The judge, Mr. Justice Ridley, ruled that this statutory provision applied only where English law was the system governing the contract. In this case Indian law was the relevant system as it was the lex loci contractus thus prima facie, the system selected by the parties. As regards the relevance of the use in this provision of the words "where proceedings are taken in any Court" his view was:

"The statute ought not to be construed more widely than if those words were not there. The words were simply inserted by way of convenience; and it would be going too far to hold that by the mere use of that phrase it was intended that the Act should have more than the usual effect given to a statute. As to the other point, this was not a matter of procedure, as it went to the merits of the case, and therefore the lex loci contractus must apply."<sup>3</sup>

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1. (1906) 22 T.L.R. 245.

2. Shrichard, at 246.

3. At 246.

Here, then, the learned judge is arguing that the presumption that an enactment is to have the scope of application allocated to it by the appropriate choice of law rule is applicable to this particular statutory provision and that the use of the words, "where proceedings are taken in any court" does nothing to rebut that presumption. F.A. Mann<sup>1</sup> argues that this case is correctly decided but, following the approach adopted in the case In re B.'s Settlement,<sup>2</sup> it could be argued that the words "where proceedings are taken in any court" clearly show that it was the intention of the legislature that the provision should be applicable in all such proceedings coming before the English courts - these words do rebut the presumption that the relevant scope of application is that designated by the choice of law rule. But, even if the case is wrongly decided, there is no need to maintain that the legislative provision should be interpreted as giving expression to a principle of external public policy. Our system requires only two categories of laws, those that have the scope of operation designated by the relevant choice of law rule, and those that do not have that scope but some wider, or perhaps, sometimes, even a narrower, sphere of application.<sup>3</sup> There seems no need to categorise, nor any advantage in attempting to categorise, any of the laws, legislative in origin or not, in this second group as being d'ordre public

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1. Op. cit. supra, at 139.

2. See this chapter at pp. 127 - 129.

3. Eek would call these laws of wider scope "preremptory laws". They are the subject of his 1973 Hague lectures ((1973) II Hague Recueil 1-73) and Kahn-Freund discusses them shortly in his General Problems at 91-93. Because these rules are usually given their extended scope for reasons of public policy in the wide sense, they are sometimes referred to as "ordre public" laws, but this designation is, according to Kahn-Freund, at 92, occasionally inappropriate. A better designation may be "laws of extraordinary application". On these laws see, also F.A. Mann, (1972-3) 46 B.Y.B.I.L. 117 at 136.

international. Indeed, as previously explained, there can be disadvantages in such as designation.

Unger shares Kahn-Freund's views that some legislative provisions should be treated as embodying principles of external public policy,<sup>1</sup> but his approach would seem to be rather different to Kahn-Freund's. His view is that, where a legislative rule gives expression to a principle of external public policy, this does not mean that the law in question should be given some fixed wider scope (perhaps be treated as applicable in all cases coming before that country's courts) but that the rule should be applied to cases, otherwise governed by foreign law, only where public policy so requires. On this approach of Unger's the flexibility inherent in the external public policy rule would not be lost.<sup>2</sup>

If Parliament instructed the courts by specific legislation to adopt this approach to some legislative provision, then the courts would, no doubt, do so, but it seems an unlikely approach for our courts to adopt otherwise. How are the courts to discover that the legislature wishes them to treat a particular legislative provision in this way, unless there is some specific instruction to this effect? Such a discretion could create uncertainty in the operation of a statute and it could be argued that the courts were encroaching on the sovereignty of

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1. Unger, op. cit. supra, at 431, 433 and 448.

2. Unger, at 431.



Parliament if they held that they had such a discretion unless it was clear that Parliament had granted it to them. It would certainly be a novel approach for the courts to hold, in these circumstances, that they have a discretion, based on public policy, as to whether or not to apply a statute. It would be better to view the statute as a specific illustration of a principle of external public policy, rather than as embodying it.

Although the general approach in England and Scotland to the interpretation of statutes has been that the meaning of an enactment is to be gleaned from its provisions and not from any external source, it has long been recognised that the purpose, or policy, of legislation has some relevance in this regard. Where an enactment is given an interpretation influenced by its purpose it may, sometimes, be said to have been given that meaning for reasons of public policy.<sup>1</sup> In this chapter the broad topic of when a law can be given a wider meaning because of its purpose, a question relevant in all branches of the law and not only in conflict of laws, has not been considered; this chapter has been concerned with the narrower issue whether some rules of law can be said to embody principles of external public policy.

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1. See, for example, Graveson, Conflict of Laws (7th ed., 1974) 181, commenting on Boissevain v. Weil, [1950] A.C. 327. Kahn-Freund, op. cit. supra, at 62-65, adopts a rather different approach to this decision.

## CHAPTER 6

THE PROTECTION OF THE INTERESTS OF THE FORUM IN LITIGATION CONCERNING  
FOREIGN DELICTS

Both the Scottish and the English courts are strongly committed to the application of the lex fori in cases concerned with foreign delicts or torts.<sup>1</sup> They do not, it is true, apply the lex fori alone to these matters, the lex loci delicti also plays an important role. However, though there has been some doubt in England, if not in Scotland, about the relevance of the lex loci delicti - whether the wrong must be actionable in tort or merely not justifiable, for example, entailing criminal liability, under that system<sup>2</sup> - there has been no doubt, in either country, that civil actionability under the lex fori is a requisite

1. Dicey and Morris, The Conflict of Laws, (9th ed., 1973) 933 and 939; Anton, Private International Law, (1967) 238-250; Kahn-Freund, Delictual Liability and the Conflict of Laws (1968) II Hague Recueil 1-166, especially at 1-35.

Even in some jurisdictions applying the lex loci delicti alone as the general rule, the lex fori still plays an important roll - see Kahn-Freund, 12-20.

2. This doubt has arisen from the two interpretations given in England to that part of the rule in Phillips v. Eyre ((1870) L.R. 6 Q.B.1.) requiring that the conduct complained of such be "not justifiable" by the law of the place of the wrong. The controversial meaning given it in Machado v. Fontes ([1897] 2 Q.B. 231.) has never been part of Scots law, it was specifically rejected in McElroy v. McAllister (1949 S.C. 110 at 118), and there is a widely held view, propounded, for example, by Dicey and Morris (933 and 943), by Morris (The Conflict of Laws, (1971) 268) and by North (Cheshire's Private International Law ((9th ed., 1974) 273) that Machado was overruled in this respect by the House of Lords in Boys v. Chaplin ([1971] A.C. 356). This is not so. Those who support this view have to rely on certain obiter remarks made by Lord Guest prefaced by the statement, "The difficulties arising from .... Phillips v. Eyre .... I prefer to leave .... to those of your Lordships who are more familiar with this aspect of English Law." (Lord Guest at 381.) Lord Guest's views on the choice of law rule in tort were obiter, because he had ruled that the matter in issue was procedural thus governed by the lex fori. - See Lord Guest at 382-383.

for success.

Even on those rare occasions where a proper law type approach may be said to have been adopted in these courts, the result has been to allow the application of the lex fori and to deny effect to the foreign lex loci delicti.<sup>1</sup> Again that the place of the delict may be "fortuitous"<sup>2</sup> or ambiguous",<sup>2</sup> factors which have led some to favour the application of the proper law rather than the lex loci delicti, have also been treated by others as justification for requiring actionability by the lex fori.<sup>3</sup>

Then it has recently been decided by a Scottish judge that the liability in delict of the employer for the death of a diver killed while working beneath the North Sea in the Norwegian sector of that sea, but not in Norwegian territorial waters, should be determined solely by the lex fori on the basis that, to quote from the newspaper

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1. Boys v. Chaplin, supra, the judgments of Lords Hodson and Wilberforce; Soutar v. Peters, 1912, 1 S.L.T. 111 (Anton, op. cit. supra, 246-247; Morris, op. cit. supra, 286).
  2. The meanings of these terms in this context are explained by Kahn-Freund, op. cit. supra, 27-28.
  3. See for example, Mitchell v. McCulloch, 1976 S.L.T. 2 at 5 where Lord McDonald said, "It [my conclusion that heads of damages claimed must be available both under the lex loci delicti and the lex fori] recognises what I consider to be a realistic tendency to pay more regard to the lex fori in international questions of this sort. In a rapidly developing world it may not always be simple to point to the country in which a delict is supposed to have occurred. A delict committed on a hijacked aircraft provides a ready example." For comments on this case see Leslie, 1976 S.L.T. (News) 149 and Thomson, (1976) 25 I.C.L.Q. 873 at 891. J.M. Thomson's article provides an interesting and detailed survey of the Scottish cases on delict in Conflict of Laws.



report, "it [the delict] was admitted to have taken place on the high seas, where every country was entitled under common law to apply its own legal system".<sup>1</sup>

This determination of the courts to apply the lex fori to foreign delicts seems strange to the conflicts lawyer in view of the willingness of the courts to apply a foreign lex causae alone in so many other fields of Conflict of Laws.<sup>2</sup> Indeed delict is the only field in which the lex fori is invoked in addition to the foreign lex causae, in this case, the lex loci delicti. Some other double rules do exist, thus, capacity to marry is governed, according to Scots Private International Law, both by the lex domicilii and the lex loci celebrationis,<sup>3</sup> but the lex fori is not used as a connecting factor in these other double rules.

Some writers have suggested that this requirement of actionability by the lex fori is an example of crystallisation of a rule of public

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1. Lally v. Comex (Diving) Ltd., The Scotsman, May 19, 1976. The newspaper report is appended at the end of this chapter. On the face of it this would seem an ideal situation in which to apply the proper law even though it may well be Scots law, also the lex fori.
  2. Kahn-Freund, at 12.
  3. See Anton, at 276-283, and the Marriage (Scotland) Act, 1977, sections 1, 2, 3 and 5. This is the general rule, a possible exception is discussed in this work at p. 28.

policy.<sup>1</sup> The source of the rule is The Halley<sup>2</sup> and of this case Kahn-Freund has said, "That case was not understood (as I think it should have been) as based on the non-application of Belgian law and the application of English law by reason of the incompatibility with English policy of the shipowner's liability [under Belgian law] for the compulsory pilot. It was treated as if it had established a cast-iron rule that no tort can be successfully sued upon unless it is actionable according to English municipal law".<sup>3</sup>

What are the reasons for this insistence on applying the lex fori?

Judges and other lawyers prefer to work with their own local

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1. See, for example, Kahn-Freund, 12-14; Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws," (1954) 39 Tr. Grotius Society 39 at 45-53 (in this chapter this article will be referred to as "Kahn-Freund, Public Policy", to distinguish it from his Hague lectures on delict). See also Holder, (1968) 17 I.C.L.Q. 926 at 949.
  2. (1868) L.R. 2 P.C. 193.  
The decision is neatly summarised by Kahn-Freund, op. cit. supra, at 13 as follows: "The English Court held that a British shipowner was not liable for the consequences of a collision between his ship and a Norwegian vessel in Belgian territorial waters which occurred as a result of the negligence of a compulsory pilot, it being the law of England that a shipowner was not liable for a compulsory pilot, whilst according to Belgian law he was".
  3. Kahn-Freund, Public Policy, at 53.

system which they understand, usually admire, and know their way about. Proof of foreign law can be difficult, expensive, time consuming and inconvenient. This is, of course, true in all private law fields, not only in delict.

An important reason, though perhaps more so in the past than now, is that rules relating to delictual liability often express important rules of social or public policy which the courts are reluctant to see displaced by foreign rules.<sup>1</sup> No doubt, in these situations, the closer the links between the case and the country of litigation, the more the court feels obliged to apply its own law. This leads us, I believe, to the heart of the matter. The main reason for the application by the courts of the lex fori is the real or imaginary defects of what was thought to be the alternative approach, that is, the application of the lex loci delicti alone. In many cases the invariable unqualified application of the lex delicti would seem to produce unsatisfactory results and it was sought to combat this problem by requiring the application, as well, of the lex fori. In this way the local defender could be protected against the idiosyncracies and excesses of foreign systems. This approach could be viewed as particularly apt where the pursuer too was local. The position was less satisfactory where he

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1. Kahn-Freund, 26-27.



was foreign. However, there was the argument, unsound though it may, on occasions, be, that the foreign pursuer should litigate in the country where the delict was committed if he seeks the remedies provided by its laws.<sup>1</sup>

Many of the problems inherent in the application of the lex loci delicti as the sole system in delict can be overcome by the adoption of a proper law type approach as is now widely advocated.<sup>2</sup>

In simple terms the proper law of a delict may be said to be the system with which the wrong is most closely connected or the system with the greatest interest or concern in the case. A far more sophisticated and complicated approach, but still on the same lines, has been adopted in the Second Restatement.<sup>3</sup> Much greater flexibility

1. See Anton, 239, note 12 and this chapter at p. 150.

2. See, Dicey and Morris, 935-937. Morris, 259-261, 268-270, 278-283; Anton, 244-245. Anton favours the proper law with a presumption that it is the lex loci delicti. Another approach is that adopted in the first two paragraphs of the now abandoned main delict article (then Article 10) of the E.E.C. Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, as set out in the Consultative Document of the Law Commission and the Scottish Law Commission of August 1974, which read as follows: "Non-contractual obligations arising out of an event which has resulted in damage or injury shall be governed by the law of the country in which that event occurred."

However, if, on the one hand, there is no significant link between the situation arising from the event which has resulted in damage or injury and the country in which that event occurred and, on the other hand, the situation has a closer connection with another country, then the law of that other country shall apply."

It has also been suggested that the personal law has a roll to play in delict - see Articles 31 and 32 of the Report on Private International Law of the Private International Law Committee, Civil Code Revision Office (Quebec) 1975. See too, the Consultative Document, 10.1.5. and Kahn-Freund, 15-17.

3. Kahn-Freund, 49-51.

is provided by multi-element connecting factors like the proper law than by single-element connecting factors such as the locus delicti. Uncertainty and difficulty of prediction are said to be the penalties for the use of such connecting factors, but even single-element connecting factors like the locus delicti can provide considerable problems of ascertainment.<sup>1</sup> This proper law approach offers a sensible if not easy solution to situations where the place of the delict is "fortuitous" or "ambiguous" or indeed, where there is no legal system in force at the place of the delict.<sup>2</sup> Where there are close links between a delict and the forum, the lex fori can be designated the proper law of the delict, or the proper law of some aspect of the delict.

I wish now to consider what means would be left to the judges to safeguard the interests of the forum in cases including foreign delicts if they were to abandon the double delict rule in favour of a proper law type approach. I consider that a major obstacle to reform in this area is the belief that if the requirement of actionability by the lex fori is abandoned, insufficient means will

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1. Dicey and Morris, 968-978; Morris, 285-6; Anton, 245-7; Kahn-Freund, 28-29.

2. As was technically the position in Lally v. Comex (Diving) Ltd., supra.



be left to protect the interests of the forum. To what extent this fear is misconceived is a matter best left until we have considered the means available for the protection of these interests.

An obvious point here is that in some cases concerning delicts committed abroad, the proper law<sup>1</sup> of the delict will be found to be the lex fori. In such a case no problem arises as regards the protection of the forum's interests. Again the courts could, where this is clearly the intention of the legislature, give a legislative provision on delict some wider scope than to apply it only where Scots law is the proper law of the delict. Hopefully, such instances would be rare.

In some cases the important links between a delict and a foreign country may seem to preclude the application of the lex fori as the proper law. Even in this situation certain approaches are available which can ensure an important roll for the lex fori. The first is that of dépécage.<sup>1</sup> The idea here, considered in the delict context, is that a dispute in the field of delict may raise two or more separate issues, all within the broad field of delict, and that, whereas one legal system may be the proper law on one or more issues, another or other systems may govern, in this roll, in respect of other

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1. On dépécage see Morris, 544.



issues. Thus where a local wife is injured in a road accident abroad allegedly by the negligence of her husband, the driver of the vehicle she was in, the issue of whether he was negligent might be thought to be appropriate for determination by the lex loci delicti, if that was considered to be the most closely connected system on that issue, whereas the question of heads of damages claimable by her from him should, it could be argued, be governed by their common personal law, the proper law on that issue.<sup>1</sup> In this situation among the reasons why the lex loci delicti may be thought appropriate to determine whether there was negligence is the relevance to this issue of local traffic laws on topics such as precedence of traffic, restrictions on the speeds of vehicles, safety precautions and the like. However, even where laws in force at the place of the delict like these are relevant, another system, perhaps the lex fori, could be applied as the proper law and the traffic laws of the locus delicti were treated as "data"<sup>2</sup> in deciding

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1. This dépécage approach was adopted by Lord Wilberforce in Boys v. Chaplin, Supra, at 391-392, and by Fuld, J. in the famous American case of Babcock v. Jackson, [1963] 2 Lloyd's Rep. 286. The relevant remarks of the latter judge are set out in North, op. cit. supra, at 266. Dépécage is not without its difficulties. To apply different legal systems to different aspects of the same delict could produce some strange results. The same difficulty arises in contract - see Anton, 198 and North, 240-243. Dépécage is a useful tool but one that must be used with care.
  2. On this idea see Dicey and Morris, 951; Morris, 545-546; Kahn-Freund, 98-99.

whether there was negligence according to the proper law. Here the traffic laws would be viewed as factors potentially relevant to negligence as would facts like the condition of the road surface, visibility and traffic density at the place of the accident at the relevant time, but whether the overall situation discloses negligence remains a matter for the other system, the proper law.

It has been noted that a delict case may involve a number of separate delictual issues to which different legal systems may be applied. Relevant here too is the fact that issues may also arise in a delict case that need not be characterised as delictual and to which the choice of law rule on delict need not be applied. Thus some claims may be available in either delict or contract.<sup>1</sup> Then cases of liability or immunity in delict within the family such as parental liability or interspousal immunity could be treated as family matters governed by the personal law<sup>2</sup> and transmission on death of

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1. Dicey and Morris, 937, Kahn-Freund, 130-141; Collins, (16) 1967 I.C.L.Q. 103-144, Sayers v. International Drilling Co. N.V., [1971] 3 All E.R. 163 especially at 166-167, Brodin v. Seljan, 1973 S.L.T. 198.

2. Kahn-Freund, 64-68 and 104-106.

delictual claims and liabilities could be viewed as matters of succession.<sup>1</sup>

In this way a foreign system that would be applied if the matter were characterised as delictual may be avoided. This is not to suggest that the use, or misuse, of characterisation as a means of avoiding defective choice of law rules is to be encouraged but obviously some issues arising in a delict case may be characterised, legitimately, as falling outwith the juridical category of delict for the purposes of Conflict of Laws.

In this context the rule that matters of evidence and procedure are governed by the lex fori is of substantial significance. A number of important matters in delict are characterised as procedural thus governed by the court's own laws. For instance, a court can only award remedies available under its own system.<sup>2</sup> Again, quantification

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1. Kahn-Freund, 110-113.

There are further examples. Thus claims between joint wrongdoers can be characterised as quasi-contractual. See North, 284.

2. Anton, 86 and 548; Dicey and Morris, 1099. Boys v. Chaplin, supra, Lord Pearson at 394.

".... when a court is required to go beyond merely determining the rights of the parties and to proceed to enforce those rights, it can scarcely proceed in a manner for which its organisation and powers make no provision." - The Consultative Document of August 1974 of the Law Commission and the Scottish Law Commission on the E.E.C. Draft Convention on Obligations, 11.2.3.



of damages is for the lex fori<sup>1</sup> - a useful safeguard against inflated claims based on a foreign lex causae.

Then certain laws, those that render the obligation unenforceable or require special methods of proof, in contrast to those that extinguish the obligation, are considered to be procedural. Such prescriptive laws of the lex fori will be applied even to foreign delicts while those of foreign lex causae will be ignored.<sup>2</sup> This position is hardly satisfactory<sup>3</sup> and perhaps all prescriptive laws should be treated as substantive for Conflict of Laws purposes.

It will be observed from what has been said about prescriptive laws that the rule that procedural matters are governed by the lex fori operates as a two edged sword. Not only does it require the application

1. Anton, 249; Dicey and Morris, 965; Boys v. Chaplin, *supra*, Lord Hodson at 379, Lord Guest at 381 and Lord Wilberforce at 392-393. In contrast heads of damages and remoteness of damage are matters of substance - see the authorities listed in this note. Thus even if the heads of damages of the proper law are recognised, the amount awarded under each head will be a matter for the lex fori to determine. The courts, in these circumstances, may find themselves having to quantify damages in respect of heads of damages unknown to the lex fori.
2. Anton, 545-546 and 226-228 (since Anton wrote the important Prescription (Scotland) Act, 1973, has been enacted); Dicey and Morris, 1103-1106.
3. Anton 227. A recent case, unsatisfactory, in my view, in this regard, is Black-Clawson v. Waldhof-Aschaffenburg, [1975] A.C. 591.

of the procedural rules of the lex fori but it denies effect to the procedural rules of the foreign lex causae. This illustrates a general characteristic of choice of law rules. Where such a rule indicates a foreign system as applicable on a particular issue, it only so renders such laws of that lex causae as fall within the juridical category of the choice of law rule. Laws that fall outwith that category are not applied unless the category to which they belong also falls to be governed by the same lex causae. Thus, if we are to apply French law as the domiciliary law in respect of an issue involving intestate succession to moveables, only such rules of French law are relevant as fall within the juridical category of "intestate succession to moveables". Characterisation of a rule of law, as in the case of characterisation of a matter in dispute between the parties to a case, is generally considered to be a matter for the lex fori though a foreign law should, we are told, be examined, for this purpose, in the setting of the system to which it belongs.<sup>1</sup> Giving ultimate control in this way to the lex fori provides protection against unsound foreign characterisations.

It is claimed that there has been a tendency in the past for

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1. Anton, 49-52; Dicey and Morris, 30-33; Scottish National Orchestra Society Ltd. v. Thomson's Executor, 1969 S.L.T. 325 at 328; Metal Industries Ltd. v. Owners of S.T. "Harle", 1962 S.L.T. 114.

courts to give a rather broad meaning to the category "procedure" and thus too wide an application to the lex fori. The line between matters of procedure and those of substance is not easily drawn. Thus it can be argued - that certain "procedural" rules on presumptions of law and burden of proof are so closely connected with substantive matters that they should be treated as matters of substance governed by the lex causae appropriate to such matters and not as matters of procedure governed by the lex fori. To refuse to do so could well undermine the substantive right granted by the lex causae. It would, arguably, be wrong for a court in country A to require a pursuer in a delict case to which it was applying the law of country B, to prove the negligence of the defender where an applicable presumption of this negligence, available under the law of country B, has no equivalent in the internal law of country A. However, changes in the positions of the parties as regards burden of proof and presumptions, of the type illustrated in Gibson,<sup>1</sup> brought about by the pleadings of the parties, must surely remain questions for the lex fori. An attempt to formulate this approach in a rule of law is to be found in the first paragraph of Article 19 of the E.E.C. Draft Obligations Convention in its 1974

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1. Gibson v. British Insulated Callenders' Construction Co. Ltd., 1973 S.L.T. 2.



form.<sup>1</sup> It reads,

"The existence and force of presumptions of law, together with the burden of proof, shall be determined by the law which is applicable to the legal relationship. However, the consequences to be drawn from the conduct of a party in the course of the proceedings shall be determined by the law of the forum."

Another weapon available to the courts in their attempts to exclude offensive foreign laws, delictual or other, is the external public policy rule discussed in Chapter 1. This is a useful weapon but its application can generally only be justified in extreme cases where the claim is clearly objectionable.

Also relevant here is the rule excluding foreign penal laws again discussed in an earlier chapter (Chapter 3). Where there are penal elements in the damages available under a foreign system this rule could be used to reduce the damages to a sum that reflects the actual loss suffered by the pursuer. A claim under an English proper law for exemplary damages could be rejected by a Scottish court on this basis.

I have not yet managed to think of a possible application in the field of delict for the rule that foreign revenue laws will not be enforced.

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1. The E.E.C. Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, as set out in the Consultative Document of the Law Commission and the Scottish Law Commission of August 1974. This draft convention seems to have lost its non-contractual provisions and is now known as the Draft Convention of the Law Applicable to Contractual Obligations. Article 19 has been redrafted but it is still basically to the same effect.

When it is sought to litigate in respect of a foreign delict in Scotland, the doctrine of forum non conveniens may be of relevance. The idea here is that, even where a Scottish court has jurisdiction, it may decline to exercise it, usually at the instance of the defender, on the ground that the just determination of the case requires that it should be heard in some other forum which also has jurisdiction.<sup>1</sup> That the case involves questions for determination by the internal law of the other, foreign, court is clearly a fact relevant to whether the plea should, or should not, be sustained but too much weight should not be attached to this factor.<sup>2</sup> In this connection one should remember too that the mere fact that a foreign court also has jurisdiction does not mean that its decree will be recognised in Scotland. Thus where the defender's assets are all in Scotland, the refusal by the Scottish court to hear the matter could mean that the pursuer is deprived of an effective remedy.

All in all, then the courts would have a number of useful ways

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1. See Anton, 148. This doctrine is found too in the American legal system. It has been said not to be part of the English legal system, see, for example, Morris, 82, but see MacShannon v. Rockware Glass Ltd., [1978] 1 All E.R. 625.
  2. See Anton, 151 and 239 footnote 12.



of protecting the interests of their own system if they were to apply the proper law in delict.<sup>1</sup> My main purpose here has been to list these methods; the extent to which they will be effective requires further consideration, but I would think that they go a substantial way towards providing the protection required. There is an attendant danger: some of the methods, perhaps most, have a potential for misuse - there is a temptation to use them to unjustifiably expand the sphere of operation of the lex fori.<sup>2</sup>

To return to the efficacy of the methods of protecting the lex fori which have been listed, this must be viewed in the light of the consideration that there are substantial disincentives to litigate in Scotland in foreign law, particularly for the foreign pursuer.<sup>3</sup>

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1. I have not discussed the possible use of remission (renvoi) in this context as I think situations where it could assist are hardly likely to arise. The idea here is that a Scottish court may refer a delictual matter to the system it considers the proper law merely to find that that system would apply Scots law. In these circumstances the Scottish court could apply its own system. This remission could also occur where the forum applies the lex loci delicti and the foreign forum the proper law, or even the lex loci delicti ascertained in a way different from that used in the forum.
  2. Indeed many of these methods or processes are condemned by the American writers of the "Policy-Evaluation" school as being devices improperly used to keep an archaic Conflicts system in operation.
  3. The main problems are expense and inconvenience. In Scotland a foreign litigant may be required to post a mandatory - see Anton, 552-554 and the case of Fink v. Armstrong, The Scotsman, November 5, 1977 in which it seems to have been overlooked that the Scottish decree could, perhaps, be enforced in the Netherlands under the arrangements reciprocal to those provided for the recognition of Dutch decrees under the Foreign Judgments (Reciprocal Enforcement) Act 1933. A copy of the report in The Scotsman is appended at the end of this chapter. The heading to the report is somewhat misleading. In England the foreign litigant may be required to give security for costs. See, for example, Landi Den Hartog B.V. v. Stopps, [1976] 2 C.M.L.R. 393 (Q.B.D.).



Thus no pursuer will averr fofeign law unless this is very clearly to his advantage - in the absence of averrments of foreign law a Scottish court will apply its own system, even to delicts that have occurred abroad.<sup>1</sup> These disincentives inhibit the bringing of litigation in delict in Scotland involving foreign law and this reduces the incidence of these potentially troublesome cases.

A fear of Scottish judges has been and, no doubt, still is, that, if they abandon the lex fori as a system applicable to foreign delicts, they might have to award damages for a wrong not known to Scots law.<sup>2</sup> To end this chapter we will look at such a situation and see if it would really involve such undesirable consequences. The situation here is that a foreigner (Mr. A) sues a local resident (Mr. B) in a Scottish court for adultery which is no longer a delict in Scotland.<sup>3</sup>

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1. Pryde v. Proctor and Gamble, 1971 S.L.T. (Notes) 18; Bonnor v. Balfour Kilpatrick, 1974 S.L.T. 187.
  2. See for example, the remarks of Lord Thomson in McElroy v. McAllister, supra, at 117 set out in Anton, at 239 and those of Lord McDonald in Mitchell v. McCulloch, supra, at 5.
  3. The Divorce (Scotland) Act, 1976, s.10, abolished the aggrieved husband's delictual claim against his wife's paramour. This provision did not deal with the wife's action against a woman committing adultery with her husband as there is no known case of this action being brought in Scotland. On this see Clive and Wilson, The Law of Husband and Wife in Scotland, (1974) 277.

If a foreign law under which adultery is civilly actionable is the proper law - perhaps Mr. and Mrs. A live in a country where adultery is a delict and the wrong took place when Mr. B was on holiday there - then that law should be applied and damages granted. But, quantification of the damages would be a matter for Scots law and no penal damages would be awarded. This solution hardly seems objectionable. However, if Scots law is the proper law, as could be the case were Mr. and Mrs. A on holiday in Scotland at the time of the adultery, then no action should be available to Mr. A. Another example where Scots law could be the proper law is where all the parties involved in an adultery were Scots on holiday in the foreign country.

A difficulty arises where the delict cannot be said to have substantial and predominant links with any one country, including the country where the delict was committed, as to justify the application as that country's law as the proper law. This could be the case where Mr. and Mrs. A were holiday visitors to the foreign country where the adultery took place from some country other than Scotland. In such a case there may be a predominant solution to the problem even if there is no predominant system. Thus, in this last version of our example, all the parties may have their homes in countries where adultery is not civilly actionable. Another solution would



be to apply the most closely connected system even if the connections with it are only slightly less tenuous than those with other involved systems. However, in a situation like this where no foreign system or solution has any real claim to prevail, the court could as well apply the lex fori.<sup>1</sup>

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1. Perhaps this is the situation that Lord McDonaId had in mind in the quotation from his judgment in Mitchell v. McCulloch, supra, set out earlier in this chapter at p. 136, note 3.



SCOTSMAN, WEDNESDAY, MAY 19, 1976

(Lally v. Comex)

## N Sea death claim will be heard in Scots court

Though a North Sea diver died in an accident while working from an oilrig in the Norwegian sector of the continental shelf, claims for £41,000 damages arising from his death have been allowed to proceed in the Court of Session.

Lord Stott rejected a plea by Comex (Diving) Ltd., the international diving concern with offices at Buckburn, Aberdeen, who are being sued, that the case was irrelevant in Scotland and that Norwegian law should be applied.

The judge said the action was by certain relatives of the diver, who was employed by Comex.

It was common ground that if it had happened in Norwegian territorial waters Norwegian law would have been relevant. But it was admitted to have taken place on the high seas, where every country was entitled under common law to apply its own legal system.

### 'NO CHANGE'

Comex argued that this common law situation had been modified by international agreement. Reference was made to the Continental Shelf Act, 1964, which enabled effect to be given to certain provisions of the Convention on the High Seas, 1958, relative to the North Sea continental shelf and also the Continental Shelf Jurisdiction Order, 1965.

Lord Stott said it was plain that the measures related solely to an extension of rights by the UK to what was called the UK sector of the shelf. He took it that so far as the law applicable in the Court of Session was concerned, there had been no alteration in the common law position.

The claims, which will now be heard in Edinburgh, are by the mother, Mrs Elizabeth Lally, 6 Hutchison Road, Edinburgh, and two children of the dead man.

SCOTSMAN, THURSDAY, APRIL 28, 1977

(Lally v. Comex)

# Judge refuses to delay widow's damages claim

By GEORGE SAUNDERS, Our Chief Law Reporter

A judge has refused to delay a claim for damages of £42,000 by the family of a diver drowned in the North Sea, to enable them to pursue a claim for \$1.2 million in the U.S.

The decision is expected to have far-reaching legal implications in claims against multinational concerns such as oil companies and airlines, when the actions can be raised in more than one country.

Thomas Lally drowned in the Norwegian sector when diving to 230 feet off an oilrig in March 1971.

His widow, Mrs Elizabeth Lally, of Hutchison Road, Edinburgh, sued Comex (Diving) Ltd., of Crombie Place, Aberdeen, for £2000 in the Court of Session and also claimed £20,000 for each of

her husband's two children, Mark Lally (11), of Hutchison Road, Edinburgh, and Elin Olsen, of Stavanger, Norway. Evidence in the case is due to be heard in the Court of Session on May 10.

In May last year, Lord Stott rejected a plea by Comex that the case should be dealt with according to Norwegian law. He said it was agreed that if the accident had happened in Norwegian territorial waters Norwegian law would have applied. But it happened on the high seas where every country was entitled, under common law, to apply its own legal system.

This week, the judge was asked by the widow to delay the Scottish proceedings to allow her claim to be heard instead in America. Lord Stott was told that she had raised an action in

America for \$1.2 million against three companies—Ocean Drilling and Exploration, Philips Petroleum, and Comex Marine Services Inc., an associate company of Comex (Diving).

The judge was also told that the American court would debate the issue of jurisdiction in September and he was asked to delay the Court of Session case. Damages, if awarded, would be very much higher in the U.S. than any award in Scotland or the U.K. But if the case was decided or settled in Scotland then the American action would have to be abandoned, the court was told.

Lord Stott refused to delay the hearing on May 10 and said that the family should have made up their minds long ago in which court they would bring proceedings.

Correction (April 29): Mrs. Lally is the mother not the wife of the deceased.

OBSERVER, JUNE 19, 1977

(Lally v. Comex)

# Lawyers fish for North Sea cash

by BRIAN WILSON

DIVING accidents in the North Sea have become big business for several American lawyers who are exploiting the provisions of an American law to seek massive damages in the States.

There are 20 cases pending in the United States, all related to deaths or injuries which were suffered in the British sector of the North Sea.

Some of the actions are for more than \$1 million, and all are for far greater sums than would be likely to be awarded by British courts. The American interest in diving mishaps has developed to such an extent that the Law reform Committee at Lloyd's is preparing to fight test cases in the US, in an effort to establish that what happens in the North Sea is outside the jurisdiction of the American courts.

At present, the most tenuous connection between the employing company and the US is sufficient justification for American courts to be involved. This, at least, is the lawyers' interpretation of the Jones Act, which states that any marine structure anywhere in the world which is owned in any part by an American corporation is under the jurisdiction of American law. That definition covers just about every piece of hardware involved in North Sea exploration.

There is plentiful evidence that the American lawyers are actively canvassing for business in Britain, and that 'ambulance chasers' are retained by them to reach injured divers or the dependants of dead divers as soon after an accident as possible in order to persuade them to authorise the lawyer to pursue the case.

The scale of the business and the techniques used were highlighted last week by the BBC Scotland programme 'Current Account.' Mrs Irene Lally of Edinburgh, mother of a diver who died, said she had been visited by two lawyers who told her they were 'doing all the divers' cases' and could get \$1 million for her son's two children.

Mrs Lally has now received a £30,000 settlement in the British courts, but the case is still being pursued in the US—and American lawyers are trying to have other cases settled in Britain re-opened in the States.

Mr Derek Bannister of Uxbridge, who is paralysed for life from the waist downwards as a result of an accident in which another diver died, said that his fiancée and parents were approached while he was still in hospital. An agent for a Houston lawyer offered 'unreal' amounts of money of which the lawyers would take 30 per cent.

Mr Michael Payne, chairman of the Lloyd's Law Reform Committee, said yesterday: 'We are trying to stop the law from being misused. There are a number of American attorneys actively involved in rounding up plaintiffs and persuading them to make claims against British employers in the US courts.'

In addition to pursuing the test cases the Lloyd's Committee are asking the Lord Chancellor to take action to 'stop the toutting for business by unscrupulous American lawyers.'



SCOTSMAN, SATURDAY, NOVEMBER 5, 1977

(Finke v. Armstrong)

## EEC law is invalid, judge tells woman

A Court of Session judge has ordered a German woman suing for damages of £5000 arising from a road accident, to appoint a mandatory to conduct her claim in Scotland.

Lord Dunpark said he did so because there was no agreement to which the UK was a party providing for reciprocal enforcement of judgement of courts in different countries of the EEC. The Treaty of Rome made provision for this but the convention in 1968 did not include the UK.

Miss Ingrid Finke, of Schale Dorfstrasse, West Germany, is suing the Rev. Raymond Armstrong, of St John the Baptist's vicarage, Broughton, Fulwood, near Preston, for injuries which she claims she sustained when she was struck by a car driven by him in High Street, Fort William, in August 1973.

### RECIPROCAL

At a preliminary hearing, the judge ordered her to appoint a mandatory who would be responsible for conducting her litigation in Scotland and granted her leave to appeal against the decision. But in a later decision the judge said he refused leave to appeal after examination of authority on the question.

The move to appoint a mandatory was opposed, he said, on the ground that EEC legislation had

the effect of making judgments of the West German courts and the Court of Session mutually enforceable. He took the view that a mandatory should be appointed who would be personally responsible for conducting the litigation in Scotland. He said he granted leave to appeal in the belief that the courts of the two countries were bound by reciprocal enforcement provisions of EEC legislation.

However, on examination of the provisions, he was now of the opinion that there was not yet any EEC provisions of that kind between the UK and the other countries.

## CHAPTER 7

## UNRECOGNISED GOVERNMENTS AND THE CONFLICT OF LAWS:

a review of the recent cases with special reference to the Rhodesian situation.

"If it be in the interests of high policy, it is not in the interests of justice." - Lord Denning.

The unilateral declaration of independence by the Smith government in Southern Rhodesia in 1965 and the events that followed resulted in a flood of legal literature.<sup>1</sup> These writings have been mainly concerned with the implications for international law or constitutional law of U.D.I. and its consequences. In this chapter the material is to be approached from a different angle - the principal concern here is with the conflict of laws aspect or, more accurately, with the rules of English law on the enforcement of the laws and acts of officials of unrecognised governments in the field of private law. The consequences of U.D.I. have illustrated very clearly the limitations of the traditional approach in this field and have resulted in some significant development of the rules by the courts and, in so far as Southern Rhodesia is concerned, their significant amendment by legislation. It is these

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1. See, for example, the writings listed in footnote 2 of H.R. Hahlo, "The Privy Council and the 'Gentle Revolution'" (1969) 86 S.A.L.J. p.419.

developments that are to be reviewed in this chapter.<sup>1</sup>

Before the Carl Zeiss case<sup>2</sup> came to the House of Lords in 1966, the courts tended to the view that, where a government is unrecognised, its legislation and the acts of its officials could not be given any effect, even in the field of private law, and even where the unrecognised government is not a party to the dispute.<sup>3</sup> In this case it was argued that, as the United Kingdom government had not recognised the East German government, the latter's acts could not be enforced. This argument was rejected, it being held that although the United Kingdom recognised the Soviet Union and not the East German government as the governing authority in East Germany, the acts of this latter government would be given effect in the United Kingdom "... because they are acts done by a subordinate body which the U.S.S.R. set up to act on its behalf."<sup>4</sup> In this way the problem of the effects of non-recognition in the sphere of private law was avoided, but this way out will not always be available. Where it is not, the consequences of non-recognition will be very serious. Lord

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1. The distinction between de facto and de iure recognition is of little significance in the context of this chapter. On the distinction see Starke, Introduction to International Law (8th ed., 1977) pp.162-8 and Dicey and Morris, The Conflict of Laws (9th ed., 1973) p.560.
  2. Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853 (H.L.).
  3. See, for example, Luther v. Sagor, [1921] 3 K.B. 532 (C.A.) and Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1965] Ch. 596 (C.A.).
  4. Lord Reid at 907.



Reid made this point in Carl Zeiss in relation to the position that would exist if the East German government could not be recognised in this indirect way, as follows:<sup>1</sup>

"Counsel for the respondents did not dispute that in that case we must not only disregard all new laws and decrees made by the German Democratic Republic or its Government, but that we must also disregard all executive and judicial acts done by persons appointed by that Government because we must regard their appointments as invalid. The result of that would be far-reaching. Trade with the Eastern Zone of Germany is not discouraged. But the incorporation of every company in East Germany under any new law made by the German Democratic Republic or by the official act of any official appointed by its Government would have to be regarded as a nullity, so that any such company could neither sue nor be sued in this country. And any civil marriage under such new law, or owing its validity to the act of any such official, would also have to be treated as a nullity, so that we should have to regard the children as illegitimate. And the same would apply to divorces and all manner of judicial decisions whether in family or commercial questions. And that would affect not only status of persons formerly domiciled in East Germany but also property in this country the devolution of which depended on East German Law."

But Lord Reid felt that there may be a way out of this difficulty if the English courts could adopt certain doctrines which had found some support in the United States of America, though he expressed no view on whether

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1. At 907.

this would be possible as it was unnecessary for the decision of that particular case. Difficult questions had arisen in the United States with regard to acts of administration in the Confederate States during the Civil War and again out of the delay in recognition to the Soviet Union, and these doctrines were developed by the American courts to solve these problems.<sup>1</sup>

On this issue of the legality of East German legislation all the other judges in the House of Lords agreed with the views of Lord Reid or adopted a similar approach. Of these only Lord Wilberforce considered independently the question whether there could be any exception to the rule that non-recognition of a government meant non-recognition of its legislation. He, like Lord Reid, pointed out the unsatisfactory results that would flow from the application of the rule. For instance, he says:<sup>2</sup>

"By logical extension it seems to follow, ... that there is, for many years has been and, until the attitude of Her Majesty's government changes, will be, in East Germany a legal vacuum; subject only, it may be, to the qualification that pre-existing German law, so far as it can continue to be operated or have effect, may continue in force. Whether in fact it can continue to be operated to any great extent if its operation depends on administrative or judicial authorities set up by the non-existent "government" must be doubtful."

If this were the result of the accepted approach then, he felt, its revision may be necessary:

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1. At 907-8.

2. At 953.

"My Lords, if the consequences of non-recognition of the East German "government" were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigation of the severity of this result can be found."<sup>1</sup>

"In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question. These ideas began to take shape on the termination of the Civil War ..., and have been developed and reformulated, ..., in later cases."<sup>2</sup>

Lord Wilberforce conceded that no trace of this doctrine was to be found in English law but suggested that there was nothing in the relevant cases that would prevent its adoption. It was not then necessary to decide the point but he was of the view that whether and to what extent the doctrine could be invoked remained an open question.<sup>3</sup>

This problem has, in general, been neglected by the textbook writers but Anton, in his work on conflict of laws published in 1967,<sup>4</sup> criticises the

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1. At 954.

2. At 954.

3. At 954.

4. A.E. Anton, Private International Law (1967) pp.82-5. See too K. Lipstein, "Recognition of Governments and the application of Foreign Laws" (1950) 35 Tr. Grotius Soc. p.157, and D.W. Greig, "The Carl Zeiss Case and the Position of an Unrecognised Government in English Law" (1967) 83 L.Q.R. p.96.



strict approach and points out the injustice which its application can cause. He refers with approval to the possible exception to the strict approach mentioned in Carl Zeiss. He submits that the main reason for applying foreign law choice of law rules is to do justice to the individuals concerned - it is not because comity between nations requires it. The factors relevant to the granting of political recognition of states for public international law purposes and those concerned with recognition for private international law purposes are different, therefore there is no valid reason why political non-recognition should be accompanied by non-recognition for private international law purposes where the rights of private individuals are concerned.

"If our courts gave effect in matters of private right to the law of Germany while in a state of war with Britain, why should it not give effect to the legislation in matters of private right of countries whose governments are not recognised by the United Kingdom?"<sup>1</sup>

This then was the state of the law on this topic of recognition of governments in private international law when the legal consequences of U.D.I. in Rhodesia came before the courts. This declaration was made on November 11, 1965. On the same day the Governor declared U.D.I. unconstitutional and notified the Prime Minister and the other ministers that they no longer held office.<sup>2</sup> Shortly thereafter the United Kingdom

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1. At p.85. Enemy aliens, of course, cannot sue in our courts.

2. Madzimbamuto v. Lardner-Burke, [1969] A.C. 645 at 714 (P.C.).

parliament re-asserted the authority of the United Kingdom government over Southern Rhodesia in the Southern Rhodesia Act 1965. This Act also authorised the United Kingdom government to legislate in respect of Rhodesia by Order in Council.<sup>1</sup> It was immediately followed by the Southern Rhodesia Constitution Order<sup>2</sup> which, inter alia, deprived the legislature in Southern Rhodesia of legislative competence and rendered any new legislation by it void and of no effect.<sup>3</sup> One should perhaps add, as it is of relevance later, that the Governor in his statement of November 11, 1965 dismissing his ministers also said:<sup>4</sup> "it is the duty of all citizens to maintain law and order in the country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police, and the public services."

In fact, Southern Rhodesia has, since U.D.I., been under the effective control of the Smith government though no recognition, in the international sense, has been accorded it by the United Kingdom or any other government.

In certain respects the situation was inauspicious for any relaxation by the English courts of the rule that political non-recognition meant non-recognition of laws and acts of officials of the government concerned. A major reason for this was that here one of the competing governments

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1. Madzimbamuto, at 715.

2. S.I. 1965/1952.

3. Madzimbamuto, at 715-6.

4. Madzimbamuto, at 714-5. This directive was repeated on November 14 - Madzimbamuto, 738. For one view of its subsequent fate see Adams v. Adams, [1971] P.188 at 204-5.

was the United Kingdom government itself. Not only did it not concede any loss of sovereignty over Rhodesia but it was making strenuous efforts, short however of military action, to re-establish its control over the colony. To this end it had adopted a sanctions policy against the Smith government although this course would, if realised, necessarily cause some injustice to individuals. It also, as already noted, deprived the Southern Rhodesian parliament, by legislation, of its legislative competence and re-stated its own legislative authority over the territory.

However, in addition to the three main cases here relevant that came before the English courts, there were two other important cases.<sup>1</sup> The first of these, Madzimbamuto, was a Privy Council appeal from Rhodesia and the approach there adopted was the approach thought appropriate, not for an English court, but for a Rhodesian court.<sup>2</sup> The second, Bilang, was heard by the High Court of New Zealand. All these courts applied English law as the constitutional law of Southern Rhodesia but, as will be seen later, their approaches varied significantly.

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1. A further case from Germany in this field is summarised by H.R. Hahlo in "The Privy Council and the 'Gentle Revolution'" (1969) 86 S.A.L.J. 419 at 426.
  2. For example, see Madzimbamuto v. Lardner-Burke, [1969] (A.C.) A.C. 645 at 723 et seq. (P.C.).



In 1968, in Madzimbamuto,<sup>1</sup> the Privy Council had to decide whether the appellant's husband was lawfully detained in Southern Rhodesia under emergency regulations as had been held by the Rhodesian courts. This detention could only be lawful if the court was able to give effect to certain legislation of the Smith government. This case was not concerned with private international law but it must be dealt with as it is relevant to later cases concerned with such matters.

Lord Reid, delivering the opinion of the majority of the Board,<sup>2</sup> held that the nature of the sovereignty of the Queen in the Parliament of the United Kingdom, over Southern Rhodesia, must be determined by the constitutional law of the United Kingdom. Under that law Parliament is sovereign. Thus the Southern Rhodesia Act and the Southern Rhodesia Constitution Order in Council, both of 1965, could have, and did have, full legal effect in Southern Rhodesia.<sup>3</sup>

Beadle C.J., in his judgment in the Rhodesian Appellate Division, had said that a substantial measure of sovereignty had been granted to Rhodesia and that it was certainly arguable that such a grant could not

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1. See note 2 on p.166 for the citation of this case.

2. Which included Lord Wilberforce.

3. At 721-2.

be revoked by legislation.<sup>1</sup> However, he thought the point of little relevance and did not pursue it. Nonetheless, Lord Reid felt it necessary to make the point that, in the view of the majority, nothing in the relevant enactments, including the 1961 constitution, showed any intention to transfer sovereignty to the <sup>Southern</sup> Rhodesian government.<sup>2</sup>

Lord Reid then turned to the question whether the Smith government in Southern Rhodesia could be regarded as a lawful government.<sup>3</sup> He considered that the courts of a country where there had been a successful usurpation of government must recognise the new government if it is in effective control and without any rival in the sense that the legitimate government is not trying to regain control.<sup>4</sup> Presumably if this had been the state of affairs in Southern Rhodesia then the courts there would be bound to apply the laws of the new régime, disregarding the United Kingdom legislation. However, he held, that was not the position in this case:<sup>5</sup>

"The British government acting for the lawful Sovereign is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed. Both the judges

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1. Madzimbamuto v. Lardner-Burke, 1968 (2) S.A. 284 at 334. (R.,A.D.).

2. At 722-3.

3. At 721 and 723.

4. At 725.

5. At 725.

in the General Division and the majority in the Appellate Division in Southern Rhodesia rightly still regard the 'revolution' as illegal and consider themselves sitting as courts of the lawful Sovereign and not under the revolutionary Constitution of 1965. Their lordships are therefore of opinion that the usurping Government now in control of Southern Rhodesia cannot be regarded as a lawful government."<sup>1</sup>

Lord Reid then turned to the doctrine of necessity and discussed its possible application in this case at some length. The argument was that<sup>2</sup> "... when a usurper is in control of a territory, loyal subjects of the lawful Sovereign who reside in that territory should recognise, obey and give effect to commands of the usurper in so far as that is necessary in order to preserve law and order and the fabric of civilised society." There was no English authority,<sup>3</sup> but there was a series of United States decisions relating to the rebel status in the Civil War and some juristic authority, notably the views of Grotius. After reviewing this authority<sup>4</sup> Lord Reid concluded:<sup>5</sup>

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1. Beadle, C.J., looking at the situation at a later date, held that the test was then satisfied. See Ndhlovu v. The Queen, 1968 (4) S.A. 515 at 523 and 528 (R.,A.D.).
  2. At 726.
  3. Save for the statute of 1495 (11 Hen. 7, c.1) which the majority felt did not support any general proposition that a usurping government in control must be regarded as a lawful government - Madzimbamuto, at 726.
  4. At 726-9.
  5. At 729.



"It may be that there is a general principle, depending on implied mandate from the lawful Sovereign, which recognises the need to preserve law and order in territory controlled by a usurper. But it is unnecessary to decide that question because no such principle could override the legal right of the Parliament of the United Kingdom to make such laws as it may think proper for territory under the sovereignty of Her Majesty in the Parliament of the United Kingdom."

The legislation in question was specifically directed at the situation created by U.D.I. and must be given effect. It renders void the legislation of the Smith government including that under which the appellant's husband is detained.

The argument here, I would suggest, is not that the Privy Council is an English court and thus bound by Acts of the United Kingdom Parliament, however ineffective, but that the doctrine of necessity cannot be invoked where its application would clearly conflict with the legislation of the lawful government. No mandate can be implied where it conflicts with the clear intention of the lawful government as expressed in legislation.

Lord Pearce in his dissenting opinion<sup>1</sup> agreed that Southern Rhodesia remained a British colony and that the Smith government was illegal. But he felt that the doctrine of necessity was here applicable. This

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1. At 731-745.

doctrine he described as follows:<sup>1</sup>

"I accept the existence of a principle that acts done by those actually in control without lawful validity may be recognised as valid or acted on by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary running of the State, and (b) so far as they do not impair the rights of citizens under the lawful (1961) Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign. This last, i.e., (c), is tantamount to a test of public policy."

Lord Pearce, too, found support for this proposition in a number of authorities including Grotius and the United States cases on the situation arising from the Civil War.<sup>2</sup> The substance of his opinion continues:<sup>3</sup> The judges appointed under the 1961 Constitution have continued to sit after U.D.I. - this is an uneasy compromise adopted by both sides primarily, no doubt, due to the reasonable and humane desire of preserving law and order. The illegal government has clearly indicated its acceptance of this position and the approval of this compromise by the lawful government is clearly shown by various factors. There is, first, the Governor's directive to the judges, issued twice and never countermanded, calling on

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1. At 732.

2. At 733.

3. At 737 et seq.

them to maintain law and order in the country and to carry on with their normal tasks. No provision has been made by the lawful government to pay the judges, it has been left to the Smith government to pay their salaries. Lastly, in 1967 when the Chief Justice had to be absent from Rhodesia, an acting Chief Justice was appointed by the lawful government. This message of the Governor then was a mandate to the judges to do what they have done, and the message, and also the general acceptance of the situation by the United Kingdom government which it illustrates, provides sufficient evidence of implied mandate for the doctrine of necessity to be operative in this situation provided, of course, the position in Southern Rhodesia warrants it, which it does. "The necessity relied on in the present case is the need to avoid the vacuum which would result from a refusal to give validity to the acts and legislation of the present authorities in continuing to provide for the every day requirements of the inhabitants of Rhodesia over a period of two years."<sup>1</sup> "The lawful government has not attempted or purported to make any provision for such matters or for any lawful needs of the country, because it cannot. It has of necessity left all those things to the illegal government and its Ministers to provide. It has appointed no lawful Ministers. If one disregards all illegal provision for the needs of the country, there is a vacuum and chaos."<sup>2</sup>

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1. At 740 quoting Fieldsend, J.A. in the court a quo.

2. At 740.



Thus, "[i]n my view, the principle of necessity or implied mandate applies to the present circumstances in Rhodesia"<sup>1</sup> subject to the three necessary qualifications already mentioned, which do not apply here. Nor does the application of the doctrine of necessity here conflict with either the Act or the Order in Council of 1965. I believe that the contemporaneous governor's directive must be used in construing the Act and the Order in Council. The Act gives the widest powers to govern by Order in Council but it does not effect this argument for the application of the doctrine of necessity. While

"... the relevant part of the Order was simply directed to prohibiting any improper use or manipulation of the 1961 Constitution by those in control of Rhodesia, and to preventing that Constitution being taken over and used as a speciously lawful government by those who did not intend to obey its limits (as has been done on occasion elsewhere) - in short to make it clear beyond argument or subterfuge that this was rebellion."<sup>2</sup>

"Moreover, for the present argument it makes no difference if an Order in Council expressly made acts illegal and void, so that instead of being plainly illegal and void as contrary to the lawful Constitution and lawful Government of Rhodesia they also become illegal and void as contrary to an Order in Council. They were still subject to the principle of necessity or implied mandate and still within the margin of tolerance laid

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1. At 740.

2. At 743-4.

down in the Governor's directive. There is no indication in the Order in Council that it is intended to exclude the doctrine of necessity or implied mandate by enjoining (inconsistently with the Governor's directive) continuing disobedience to every act or command which had not the backing of lawful authority. Even had it done so, I feel some doubt as to how far this is a possible conception when over a prolonged period no steps are taken by the Sovereign himself to do any acts of government and the result would produce a pure and continuous chaos or vacuum. And even apart from the Governor's directive I would certainly not be prepared to infer such an intention where it was not expressly stated."<sup>1</sup>

This then was the approach of Lord Pearce.

To turn now to the general implications of the opinions in the Privy Council, it would seem that the doctrine of necessity, based on the public policy of the lawful government and its implied mandate, may be inadequate to deal with the problems facing a court in the area under the control of a usurper. Here the need to avoid a legal vacuum is the predominant factor: whether there is or is not an implied mandate from the lawful government is largely irrelevant. Beadle, C.J., in his judgment in the Rhodesian Court of Appeal,<sup>2</sup> realised that what was needed was some doctrine that would permit the provisional and limited recognition by the courts in Southern Rhodesia of the laws and acts of the Rhodesian government at the stage where that government was clearly in control of Southern Rhodesia

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1. At 745.

2. Madzimbamuto v. Lardner-Burke, 1968 (2) S.A. 284 at 290-361 (R., A.D.). See too H.R. Hahlo, "The Privy Council and the 'Gentle Revolution'" (1969) 86 S.A.L.J. 419 at 427.

but did not yet have that degree of permanence or security that would justify its recognition as the de jure government by the courts of that territory. Even Fieldsend J.A.,<sup>1</sup> who held in the Rhodesian Court of Appeal that the 1961 Constitution was still in force but that the doctrine of necessity was applicable, based his decision on the factual situation in Southern Rhodesia and not on any implied mandate from the lawful government. However, where the validity of laws and administrative acts of a revolutionary government come before the courts of other countries for determination whether they can be recognised in those countries for private international law purposes, then the idea of implied mandate may be more appropriate. In this respect the approach adopted by the Privy Council may be considered more appropriate to an English or New Zealand court than to a Southern Rhodesian. This will be considered again later.

In the United Kingdom, after the decisions in Madzimbamuto and Ndhlovu,<sup>2</sup> it was assumed that the acts of officials, judicial and other, appointed by, or even perhaps also continuing to act under, the Smith government were void. Thus for instance, marriages, adoptions, decrees of divorce or nullity and appointments of executors by these officials were considered ineffective.<sup>3</sup> The question whether this was the correct

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1. Madzimbamuto, (R., A.D.) at 422-444.

2. Ndhlovu v. The Queen, 1968 (4) S.A. 515 (R., A.D.).

3. See for example, Adams v. Adams (Attorney-General intervening), [1971] P. 188 at 197 and 204, and 1970 S.L.T. (News) 84.



approach finally came up for decision in England in 1970 in Adams,<sup>1</sup> heard by Sir Jocelyn Simon, P. in the Probate, Divorce and Admiralty Division of the High Court. The question for decision in that case, stated in a particular rather than a general form, was whether the fact that the judge who granted a divorce in Southern Rhodesia had been appointed by the Smith government after U.D.I., was fatal to the validity of the decree and thus precluded its recognition in England, though it was otherwise acceptable as a decree of the court of the domicile.

The court here was in a very different position from the Privy Council in Madzimbamuto: it was an English court, bound to give effect to United Kingdom legislation on Southern Rhodesia, whether or not that legislation was in fact effective in that colony. United Kingdom legislation, in this instance the 1961 Rhodesian Constitution as amended in 1964, provided the procedure for the appointment of a judge in Southern Rhodesia. This procedure, in particular that part of the procedure relating to the oath of allegiance and the judicial oath, had not been followed, therefore, the argument went, there was a fatal defect in the appointment of the judge in question. As he was not a judge, the divorce decree he granted was void and could not be recognised in England. This argument was considered decisive, but the point was also made that, as the United Kingdom government had not recognised the Smith government,

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1. See the previous note for the citation of this case.

it was not possible for this court to adopt the view of the Southern Rhodesia Appellate Division in Ndhlovu that the Smith government was the government de jure and that its constitution, under which the judge was appointed, was the only valid constitution.<sup>1</sup>

Sir Jocelyn Simon did consider whether the doctrine of necessity could in any way mitigate the harshness of this position. He considered the authorities previously dealt with as relating to necessity under the two heads of "the doctrine of necessity," and "validity of acts of a de facto judge." The separation of the two categories of necessity seems to have been influenced by an article of Owen Dixon, later Chief Justice of Australia, published in 1940 and called "De Facto Officers."<sup>2</sup> Sir Jocelyn Smith accepted the approach to the doctrine of necessity adopted by the majority in Madzimbamuto and agreed that in the case of Southern Rhodesia the doctrine could not:

"... override the legal right of the Parliament of the United Kingdom to make laws for such a territory; and that no purported law made by any person or body in Southern Rhodesia, no matter how necessary such law might be for preserving law and order, or otherwise, could have any legal effect whatsoever."<sup>3</sup>

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1. At 206.

2. Res Judicata, Vol. 1 (Melbourne 1940) 285-292. Adams, at 211.

3. At 210.

However, basing his remarks on a dictum in the majority opinion in Madzimbamuto, he went on to make the point that the requirements of the doctrine were not, in any case, met by the then existing circumstances. in Southern Rhodesia. Thus recognition under this doctrine after a rebellion is over is very different from recognition while the usurping government remains in power:

"... public policy is the very essence of the doctrine, whether one calls it 'necessity' or 'implied mandate' or anything else. All that I have been told of the political and legislative history of the UDI affair, coupled with the scope of the argument for the Attorney-General in the instant case, suggests to me that I am concerned with, so to speak, a legal blockade as a counterpart of the economic blockade. The essence of the blockade of a usurping regime is to cause it to capitulate by bringing pressure on citizens within the territory of usurpation. Innocent private individuals, even children, may be caused undeserved hardship in the process. If this is a just parallel, there does indeed seem to be all the difference between according legal recognition during the usurpation to executive, judicial or legislative acts of the usurping régime and doing so after capitulation; just as there is all the difference between allowing blockade-running during a rebellion and lifting the blockade after the capitulation."<sup>1</sup>

Then he thought that the use of the fiction of implied mandate may be necessary where it is the only means of abating the rigour of the law;

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1. At 210-211.



for instance, where legislative powers are limited by a constitution as in the United States. But it is "... less necessary when sovereign parliaments are in continuous session and able to express their wishes legislatively (particularly when legislation can be enacted by Order in Council)." <sup>1</sup> Indeed here to imply any mandate might well, he felt, be contradicting the real intention of the lawful sovereign. Thus:

"The doctrine of 'necessity' is intimately connected with concepts of public policy, a sphere in which courts of law are rightly chary of intrusion. Where one has a sovereign legislature continuously in session, it seems to me in every way preferable to leave it to the Queen in Parliament to decide how far recognition should be accorded to executive, judicial or legislative acts of organs of governments which are non de jure." <sup>2</sup>

Sir Jocelyn Simon then turned to the question of the validity of the acts of de facto officers including judicial officers. <sup>3</sup> His approach here is as follows: the doctrine of the validity of acts of de facto officers is part of English law and is based on public policy and necessity. It applied to situations where a not properly appointed but putative official exercises the duties of an office and is directed at the

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1. At 211.

2. At 211.

3. At 211.

protection of the rights of persons affected by the "official acts." It can thus have no place where the legal defect is notorious. It has never been applied during a rebellion to the acts of officers of the usurping power - indeed this common law doctrine has never been applied to the prejudice of any right of a sovereign. Then again:

"... it would be a constitutional anomaly for our courts to recognise the validity of the acts of Macaulay J. the Rhodesian judge as a de facto judge while the executive acts by those appointing him (which must include his very appointment) are refused recognition de facto by the executive here."<sup>1</sup>

"For the judiciary here to recognise the efficacy of the acts of such an appointee on the ground that he was exercising his office de facto would indeed involve the State in speaking "with two voices"."<sup>2</sup>

So, under this doctrine too, no recognition could be given to this divorce.

Although it was unnecessary for the decision of this case, but as a guide to marriage officers and as the point had been argued, the President expressed the view that decrees of judges appointed before U.D.I. but pronounced after U.D.I. were valid. His reasoning here is not convincing and the validity of the distinction in this context between judges appointed before U.D.I. and those appointed after was denied by all three judges in the Court of Appeal in the case In re James,<sup>3</sup> a case

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1. At 214.

2. At 214.

3. In re James (an insolvent) (Attorney-General intervening), [1977] Ch. 41 at 65-6, 72 and 77-8 (C.A.).

discussed later in this chapter. I would submit that it is best seen as a concession aimed at mitigating, to some extent, the rigour of the rule on non-recognition.

There is a later English case on this topic, M. v. R.,<sup>1</sup> decided in 1971 but in it Adams is merely followed - the law is not further developed.

The next case of relevance here is Bilang v. Rigg<sup>2</sup> heard in the New Zealand Supreme Court in March 1971 but not published in the reports until late 1972. The plaintiff in this case sought a writ of mandamus to compel the Registrar of the Supreme Court of New Zealand to reseal a grant of administration made in Southern Rhodesia. The grant of the Rhodesian High Court was made by Mr. Perry an additional assistant master of that court. He had been appointed after U.D.I., but the legislation in terms of which he was appointed and under which he had made the grant had been enacted before U.D.I. The Registrar was obliged by New Zealand legislation to reseal grants made in Commonwealth countries including Southern Rhodesia, but it was argued that the grant here was invalid because Mr. Perry had been appointed by a de facto Minister of Justice, a member of the unrecognised Smith government who was not, by reason of

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1. The Times, December 7, 1971.

2. [1972] N.Z.L.R. 954.



United Kingdom legislation, qualified to act as such. In short the question was: "... if a Southern Rhodesian Court applied its own law correctly, ought it to recognise the grant notwithstanding the de facto lack of qualifications of the Minister of Justice who purported to make the appointment?"<sup>1</sup>

Mr. Justice Henry who heard the case reasoned as follows: the doctrines based on necessity and considered in Madzimbamuto and Adams are here applicable. Here

"[i]t is sought to enforce the existing law on matters which rise from day to day concerning the property of those citizens who are unable to exercise such a right. To do so, I think, comes directly within the directions given by the Governor and, I think, is the presumed intention of the United Kingdom Government in the circumstances set out in particular by Lord Pearce."<sup>2</sup>

So following Re Aldridge<sup>3</sup> and Lord Pearce in Madzimbamuto, "... unless the United Kingdom legislation expressly forbids the act of Mr. Perry, his grant is competent,"<sup>4</sup> and it does not. Mr. Perry in exercising a valid statutory power was neither "acting or supporting actions in contravention of the Order in Council."<sup>5</sup> Thus Mr. Perry's grant is

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1. At 958.

2. At 961.

3. (1897) 15 N.Z.L.R. 361.

4. At 961.

5. At 961.

good and must be revealed. "This ... does not conflict with Madzimbamuto's case because there the exercise of the sovereign power forbade the legislation under which the prisoner was held."<sup>1</sup> "Here this court is reviewing that area of activity in respect of which their Lordships (in Madzimbamuto) were at pains to state was not in issue."<sup>2</sup>

On Adams he concluded:<sup>3</sup>

"I have some difficulty in distinguishing the case of Adams v. Adams. It did not, as I read it, rely upon the lack of qualification of the appointing authority,<sup>4</sup> but relied upon the failure of the Judge to qualify under the only valid constitution. Perhaps, more correctly it was an appointment under a statute (constitution) declared by the United Kingdom legislation to be invalid. In so far as Adams v. Adams may conflict with Re Aldridge (if it does) then I propose to follow the latter case because I think it binds me on this question unless the United Kingdom has expressly declared the act of Mr. Perry to be void...."

So at last, one finds the doctrine of necessity actually applied, with what one may describe as positive consequences, to the Rhodesian situation. All the law, however, is not to be found in the law reports

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1. At 961.

2. At 960; and see 956.

3. At 961.

4. This same point is made at 958 and at 960. It is not completely correct. See Adams at 214.

and the volumes of legislation; it is interesting to note that although the South African government has not recognised the Smith government, in practice the latter's legislation, administrative acts and court decrees are recognised as valid in South Africa. Indeed the matter has not even, as far as I can ascertain, specifically come up for the decision in South African courts in the twelve years since U.D.I.<sup>1</sup> I do not doubt that, if it did, they would apply some doctrine of necessity though I do not think that they would necessarily adopt an implied mandate approach.

The most recent English case on the Rhodesian situation is In re James (an insolvent) (Attorney-General intervening)<sup>2</sup> heard in 1976. A debtor was sequestrated by the High Court of Rhodesia and the Chief Justice of that court issued letters of request to the bankruptcy court of the English High Court, invoking s.122 of the Bankruptcy Act 1914, asking the English High Court to assist in collecting the debtor's English assets.<sup>3</sup> This assistance in terms of s.122 could only lawfully

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1. There is one case of slight relevance: S. v. Oosthuisen, 1977 (1) S.A. 823 (N). For discussion of this case see Dugard, (1977) 94 S.A.L.J. 127 and Rudolph, (1977) 94 S.A.L.J. 131.

2. [1977] Ch. 41 (C.A.).

3. In re James at 364.



be given if the High Court of Rhodesia was a "British Court".<sup>1</sup> The majority (Scarman and Geoffrey Lane, L.J.J.) rule that, although the High Court of Rhodesia was undoubtedly a court functioning in a British territory, and although certain of its decrees could perhaps be recognised under the doctrine of necessity, it was, nonetheless, not a "British Court".

Scarman, L.J. held:

"I do think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government. But it is a fallacy to conclude that, because in certain circumstances our courts would recognise as valid the judicial acts of an unlawful court or a de facto judge, therefore the court thus recognised is a British court. In my judgment those doctrines do not solve the questions raised

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1. The background to the case, and I borrow here from Lord Denning, was that the debtor, a lawyer in Zambia, made off with some £160,000 belonging to his firm or its clients. His partners caught up with him in Southern Rhodesia and obtained judgment against him there. It was not satisfied and he was made insolvent in Southern Rhodesia. It was thought that he had salted away a substantial amount of the money in England and thus letters of request were directed to the English court, as already related. The English Registrar in Bankruptcy acted on these letters by appointing an English receiver. The latter needed to obtain information about the insolvent's assets in England and, to this end, summoned the insolvent's brother who lived in Bromley to appear before him. The brother objected claiming that the Rhodesian High Court was not a "British Court" and was thus not entitled to the assistance it was receiving. His objection was overruled by the Registrar in Bankruptcy and he then appealed to the court. Before the matter was heard, the Attorney General applied to be made a party to the appeal and this was allowed. "At the hearing it was the Attorney-General, through his counsel, Mr. Blom-Cooper, who launched the main attack on the Rhodesian courts. It was he who asked us to give no recognition whatever to what the Rhodesian courts had done. He said that we should give no help whatever to get in the money or property of David James - so as to restore it to the rightful owners. It was, he said in the interests of high policy. All I would say about his argument is this. If it be in the interests of high policy, it is not in the interests of justice. I see no justice whatever in letting David James get away with his ill-gotten gains and letting the rightful owners go away empty-handed" - Lord Denning, M.R. at 59-60.

by this appeal. That question is simply: Was the High Court of Rhodesia in 1974 a British court?"<sup>1</sup>

Geoffrey Lane, L.J. expressed it as follows:

"... I find it impossible to accept the proposition that a judge who is measured and considered terms states that he is sitting as a "Rhodesian" court under a constitution avowedly in rebellion against the Queen is nevertheless sitting as a British court. The doctrines of implied mandate and necessity do not, as I see it, affect the question whether the court can properly be called British or not."<sup>2</sup>

His answer to the question is:

"While I can accept that the High Court of Rhodesia is a "court" .... I am not prepared to interpret a statute of the British Parliament as including within the category "British" a court which in no way appertains to, or recognises, the authority of the British sovereign in the territory where it administers justice, and which has been established by a constitution introduced in defiance of the Queen in Parliament. In my judgment the High Court of Rhodesia is not a British court: section 122 is not available to it; nor has the English Court jurisdiction to aid it under the section."<sup>3</sup>

This is clearly a tenable interpretation of s.122 though there is

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1. At 70.

2. At 77.

3. At 378.

perhaps too much emphasis on whether the Rhodesian court recognises the authority of the British government - a more important question is whether the British government recognises the authority of the Rhodesian court and, applying the doctrine of necessity, it could be said that it does. This brings us to the remaining judgment in In re James, that of Lord Denning, M.R.

Lord Denning in his dissenting judgment held that the High Court of Rhodesia was a "British Court" for the purposes of s.122 of the Bankruptcy Act 1914. He reviewed the relevant facts and concluded that:

"... during the interregnum the courts of justice in Southern Rhodesia were lawfully exercising jurisdiction over matters coming before them - under a mandate, implied in that behalf, from the lawful sovereign - provided always that they applied to those matters the laws as they existed on November 11, 1965, the date of U.D.I. and not on the laws passed by the unlawful regime".<sup>1</sup> The exercise of jurisdiction in insolvency in this case by the Rhodesian court met this test; this was a lawful exercise of jurisdiction. There remained, however, the question: the High Court of Rhodesia was clearly a court but was it a "British Court"?

Lord Denning's answer was:

"To my mind the decisive factor is that they are courts sitting in a British colony. They are administering the laws of insolvency as enacted in the days of the lawful sovereign and still in force with the authority

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1. At 63.



of the lawful sovereign. When properly administering those laws, they may properly be described as 'British courts'."<sup>1</sup>

This judgment is interesting and the basic argument is again a tenable one. However, the judgment has some serious defects.

It has already been noted that whether or not a rebellion has ended has been held to be relevant to the possible application of the doctrine of necessity.<sup>2</sup> Throughout his judgment, given in October 1976, Lord Denning speaks as if the rebellion in Southern Rhodesia should be treated, for practical purposes, as already over,<sup>3</sup> though this is not the case even now and may still not be the position for some time. If the "legal blockade" is required by public policy as a companion to the economic one, then it was clearly still then too early to dismantle it.

There are other minor complaints - for example, in my view, Lord Denning has misunderstood what was decided in Ndlovu,<sup>4</sup> and, more serious, the whole basis of his decision that the doctrine of necessity is applicable in the Rhodesian situation is undermined by his imposition of the limitation that it does not apply where the law concerned was enacted

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1. At 63.

2. See this chapter at p. 178.

3. See, for example, 61 and 67.

4. Ndhlovu v. The Queen, 1968 (4) S.A. 515 (R., A.D.).

in Rhodesia after U.D.I. The reason for imposing this limitation is the imperative nature of the provisions of the Southern Rhodesia Constitution Order 1965.<sup>1</sup> However as seen earlier,<sup>2</sup> Lord Pearce in Madzimbamuto argued that this limitation did not flow from the order and Lord Denning does not even mention, let alone discuss and specifically reject, this argument.

What conclusions can one draw then from these cases on the English law in this field? First, the English doctrine of necessity based on public policy and implied mandate can be used in three different situations where a court has to decide on the lawfulness of laws and administrative acts of revolutionary governments:

1. where the court is operating in an area under the control of the revolutionary government (Madzimbamuto);
2. where the court is operating in an area under the control of the lawful government (Adams; James);
3. where the court is operating in a neutral area the government of which recognises the previous, not the revolutionary, government (Bilang).

As regards the first situation, the doctrine of necessity is only relevant where it cannot yet be said that the revolution has succeeded because the recognised government is still effectively opposing the rebel

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1. See this chapter at p.165 . Lord Denning's interpretation is to be found in In re James at 62 and 63.

2. This chapter at p. 175.

government. Where the revolution has clearly succeeded, the courts in the territory under the control of the rebel government must give effect to the laws and acts of officials of the new government.<sup>1</sup> However, where this is not the case, where the rebellion cannot yet be said to have succeeded, the doctrine of necessity is potentially applicable, provided, as already stated, that the doctrine of necessity is part of the legal system of the lawful government. In this situation I have already argued<sup>2</sup> that the emphasis should be on the necessity of the situation rather than on any idea of implied mandate and this argument may have some relevance also in respect of the other two situations, or at least in respect of the latter of them.<sup>3</sup>

Then, as regards the private international law aspect, the relevant rule of English law is not the following: when applying the law of another country the laws and administrative acts of an unrecognised government of that country will not be given effect to subject to the exception based on necessity. It is clear from the cases, particularly Adams<sup>4</sup> and Bilang,<sup>5</sup> that the correct approach is: when applying the law

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1. See this chapter at p. 168.

2. At p. 174.

3. See the discussion at                      of this work.

4. At 207F.

5. "In short, if a Southern Rhodesian Court applied its own law correctly, ought it to recognise the grant notwithstanding the de jure lack of qualification of the Minister of Justice who purported to make the appointment?" - 958.



of another country the laws and administrative acts of an unrecognised government of that country will only be given effect to in so far as is permitted by the laws of the recognised government of that country.

Or again: when a court refers a matter under its private international law rules to the law of another country, the reference is to the laws of the recognised government of that country. Those laws may allow effect to be given to the laws and administrative acts of an illegal government or to some of them, but that is a matter for the laws of the recognised government to determine. The doctrine of necessity does not fall within that part of English law known as private international law; it is an internal doctrine. Whether, in any situation, the laws of an unrecognised government can be given effect to in an English court is a matter referred to the law of the recognised government. It may have a doctrine like that of necessity, or it may not - it is a matter of the content of the law of that government. One's own government has ultimate control though; it can always extend recognition to the revolutionary government, and the courts, too, may be able to exercise some discretion in the matter by the use of the doctrine of public policy, that is, their own public policy.

It is interesting to note that remarks in Carl Zeiss, that the doctrine of necessity might be used to recognise laws of unrecognised governments where the circumstances warranted it, have been shown by subsequent developments to be somewhat inaccurate. The English law doctrine of necessity, it would seem, can only be invoked where the law

of the recognised government in this field is English. In the present state of the law the question in the Carl Zeiss situation should be: to what extent are the laws and acts of the East German government recognised by the Soviet government?

On the English law of necessity I would suggest that the approach of Lord Pearce in Madzimbamuto is to be preferred to that of the majority in that case and to that of Sir Jocelyn Simon in Adams, and this now finds some support in Bilang and in the judgment of Lord Denning in James. The position on the recognition of legislative and administrative acts in Southern Rhodesia as set out in Adams has not proved acceptable to the United Kingdom government which has had to deal with the situation by legislation. This does not necessarily mean that the courts have failed in their duty - it may be, as suggested in Adams, that these are matters of policy best left to the government to deal with by legislation, especially where this can be done, as in this case, by order in council. On the other hand, one could argue that it is only because the courts adopted a restrictive attitude towards the application of this doctrine of necessity that such legislation was required. Then the legislation is not wholly satisfactory - it deals with the more obvious cases; but equal injustice, though perhaps to fewer persons, can occur in situations not covered by the legislation.

These legislative provisions of particular relevance here are

contained in two orders in council. The earlier, that of late 1970,<sup>1</sup> gives the appropriate courts in England and Wales and Scotland jurisdiction to hear divorce and nullity proceedings in certain circumstances where either spouse is domiciled or resident in Southern Rhodesia.

The other order, that of late 1972,<sup>2</sup> is substantially more extensive in its provisions. It validates Rhodesian marriages and divorce, nullity of marriage and certain other status decrees of Rhodesian courts which would otherwise have been void because of U.D.I. Courts outside the United Kingdom adopting the English approach to the recognition of legislation and acts of unrecognised governments can now give effect to the laws and acts of the Smith government to the extent that these are recognised in this order. This would be on the basis that these laws and acts have been recognised as valid by the lawful government.

U.D.I. in Southern Rhodesia then has provided some interesting developments in private international law as it has in certain other branches of the law. The law relating to the legislative and administrative acts of unrecognised governments is now much clearer than it was, but I think it fair to conclude that Anton's complaint still holds good; there is a tendency to give inordinate weight to state interests as against the interests of the private individuals concerned. This

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1. S.I. 1970/1540.

2. S.I. 1972/1718.



is to some extent the result of a failure to distinguish between the public law and the private law aspects of the situation and a consequent misguided insistence on consistency where this is inappropriate - what is the correct approach in the field of international relations may be quite inappropriate in the sphere of the private rights of individuals.

Two matters remain for consideration. First, I wish to consider the views of Lord Denning on the subject of the laws of unrecognised governments set out in Hesperides Hotels v. Aegean Holidays Ltd., [1977] 3 W.L.R. 656 (C.A.).<sup>1</sup> The unrecognised government in question is that of the North of Cyprus, the only government of Cyprus recognised by the British government is that set up for the whole of Cyprus by the 1960 Act of the United Kingdom Parliament.<sup>2</sup> Lord Denning considered that there were two views on the correct approach in law to the laws and acts of unrecognised governments. The one is that, as stated by Lauterpacht in

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1. The basic facts, taken from the headnote of the case, were as follows:  
 "Two companies registered under the law of the Republic of Cyprus [the recognised government] owned Greek Cypriot Hotels in Kyrenia when it was occupied by troops from Turkey invading the north of the island in 1974. They issued a writ in 1977 against an English travel company and an individual purported to represent in London the "Turkish Federated State of Cyprus" the unrecognised government, claiming damages and on injunction to restrain the defendants from conspiring to procure, encourage, or assist trespass to the hotels by circulating brochures and by inviting tourists to book holidays in the hotels. They also moved the judge in chambers for an interim injunction in terms of the writ. May J., .... granted an interim injunction.... The individual defendant appealed."
  2. Hesperides Hotels, at 661.

a work published in 1948, "... no juridical existence can be attributed to an unrecognised government and ... no legal consequences of its purported factual existence can be admitted.... The correct and reasonable rule is that both the unrecognised government and its acts are a nullity."<sup>1</sup> The other view, to which Lord Denning himself subscribes,<sup>2</sup> is that "... the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government de jure or de facto: at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth: and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not."<sup>3</sup>

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1. Recognition in International Law (1948) 145 et seq. quoted in Hesperides Hotels, at 662.
  2. Although Lord Denning prefaces his remarks quoted here with the introductory qualification, "If it were necessary to make a choice between these two conflicting doctrines, I would unhesitatingly hold that...", it is clear from his judgment that he is, in fact, applying the approach which he believes to be the correct one.
  3. At 663. It is surprising that this can be put forward as a tenable view in the current state of the law, but not as surprising as the opinion of Roskill, L.J. in Hesperides Hotels that there has been no further developments in this field since Carl Zeiss. He says, at 672, "... having regard to the observations of their Lordships in the House of Lords in the Carl Zeiss case [1967] 1 A.C. 853, and in particular to those of Lord Reid and Lord Wilberforce, it is clear that at some future date difficult questions may well arise as to the extent to which, notwithstanding the absence of recognition, the English courts will or may recognise and give effect to the laws or acts of a body which is in effective control of a particular area or place." It seems that he has, perhaps, been misled in this respect by the passage he quotes from 560 of the current edition (the 9th, 1973) of Dicey and Morris which reads: "However there is high authority for regarding as open the question whether the courts can recognise the laws or acts of a body which although it does not satisfy either of the foregoing tests" (those tests being concerned with recognition) "is nonetheless in effective control of the place in question." The only judicial authority given in Dicey and Morris for this proposition is the dicta of Lords Reid and Wilberforce in Carl Zeiss quoted in the early pages of this chapter. Both the passage and footnote appear in the previous 1967 edition and these have received no revision in the 1973 edition despite the fact that Madzimbamuto, Adams and Bilang had all been

Lord Denning's approach then is not that which has emerged as the correct one from the cases considering the Southern Rhodesian situation. As we have seen<sup>1</sup> these cases suggest that the correct approach to the laws and acts of officials of an unrecognised government is only to give effect to these if this is possible under the legal system of the lawful government. As regards the doctrine of necessity, this can only be applied where the legal system of the lawful government contains this concept; this doctrine is not part of English private international law.<sup>2</sup> Lord Denning here seems to be adopting a very different approach. He seems to be saying that the laws and acts of officials of an unrecognised government will be given effect if two requirements are present. First, that the rebel government is in control of the territory in question, and, secondly, that the relevant laws or acts are necessary for the maintenance of law and order within that territory. In applying these two tests he would not seem to consider the attitude of the recognised government to the laws and acts of officials of the unlawful government to be in any way relevant. Then, it would seem that, to him, implied mandate is, in this context, a pure fiction; it is here better described as "irrebuttably presumed mandate".

This approach of Lord Denning's raises a number of points. The

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3. decided in the intervening years.

1. See this chapter at p. 189.

2. See this chapter at pp. 190 - 192.



first I wish to make is that, though his views in this regard are part of his ratio, there is no support for this approach in the rationes of the other two judges of the court, Roskill and Scarman L.JJ. Roskill, L.J. , in the dictum quoted earlier in this chapter<sup>1</sup> clearly rejects what may be called the Lauterpacht view,<sup>2</sup> but that does not mean that he supports Lord Denning's view on the current law on this matter. It is, indeed, strange that Lord Denning nowhere considers the approach adopted in the cases on the Southern Rhodesian position as being a rival approach to his. He obviously does not consider these cases irrelevant because he quotes<sup>3</sup> from his own remarks in James<sup>4</sup> on the subject of unrecognised governments. Surely it is the view put forward in these cases on Southern Rhodesia that is the rival to his views rather than the Lauterpacht view which predates the decision of the House of Lords in Carl Zeiss? It may, technically, be possible to distinguish the English cases on the Southern Rhodesian situation from the position in Hesperides Hotels on the grounds that what was being considered in the first group of cases was the approach that should be adopted by the courts in the lawful

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1. See p. 195 footnote 3.

2. On this view see pp. 194 - 195.

3. Hesperides Hotels, at 663.

4. In re James, [1977] Ch. 44 at 62.

government's territory to the laws of the rebel government, while in Hesperides Hotels the forum was neither that of the lawful government nor that of the rebel government but that of another state. However, Lord Denning does not draw this distinction in Hesperides Hotels - indeed as already noted, he quotes from In re James, and, in any case, it is not clear - that this distinction is valid. Again Bilang<sup>1</sup> cannot be distinguished on this ground as this is a New Zealand case, but there is no mention of it in Hesperides Hotels.

There is little support for Lord Denning's approach in the authority, he cites as favouring his view of the law.<sup>2</sup> The first of these, which he states to be the most authoritative, is that of Lord Wilberforce in Carl Zeiss to the following effect:

".... where private rights or acts of everyday occurrence, or perfunctory acts of administration are concerned... the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question."

This excerpt, as quoted in Hesperides Hotels, is misleading. If the fuller quotation of the relevant passage, set out earlier in this chapter

1. This case is discussed earlier in this chapter at pp. 181 - 183.

2. ~~Hesets~~ out these authorities on 663.

at p.163 , is read, it will be observed that the reference is to American Law not English Law as Lord Denning's extract suggests. It is true, however, that Lord Wilberforce thought it might be necessary for the English courts to adopt the American approach if the appropriate situation arose though he did not decide the point as it was not then relevant. Similar obiter remarks were also made by Lord Reid<sup>1</sup> in Carl Zeiss but these are not referred to by Lord Denning. Although these dicta by Lords Reid and Wilberforce are critical of the Lauterpacht approach, it is doubtful whether any real authority for Lord Denning's particular approach, as opposed to the approach in the cases on Southern Rhodesia, can be found in these very cautious and rather general remarks clearly designated as obiter by their authors. Certainly Lord Denning's apparent abandonment of the view that the existence of the implied mandate required for necessity requires proof or can be disproved, runs contrary to Lord Reid's approach to this matter in Madzimbamuto.<sup>2</sup>

The second authority cited by Lord Denning<sup>3</sup> in support of his version of the law is an article by Professor Lipstein published in 1950<sup>4</sup> and cited in Dicey and Morris.<sup>5</sup> Apart from claiming that the article

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1. See this chapter at p. 161.

2. See this chapter at p. 169 . Lord Reid's opinion was that of the majority of the Board including Lord Wilberforce.

3. At 663.

4. The title and reference of this article may be found in note 4 on p.163.

5. At 560.



supports his view, he makes no further reference to it save for quoting its concluding sentence, which is, in fact the tenth and last of Lipstein's conclusions. It reads:

"The regulations of foreign authorities which have not been recognised may be applied as the law of the foreign country if they are in fact enforced in that country, notwithstanding that the authorities have not been recognised by Great Britain."<sup>1</sup>

This valuable, if now dated, article dealt with many other matters than that directly in point here<sup>2</sup> - it has already been pointed out that the above quotation from Lipstein is the tenth and last of his listed conclusions. This last rule of his, despite its positive form is, in fact, a statement of what he thinks, or perhaps, thought, the law on this topic should be. In view of this and the developments in this field since he wrote, little support for Lord Denning's views in Hesperides Hotels can be found in this article.

The third authority cited is Lord Denning himself, or, more accurately, part of his judgment in the case In re James. This reads:

"When a lawful sovereign is ousted for the time being by a usurper, the lawful sovereign still remains under a duty to do all he can to preserve law and order within the territory: and, as he can no longer do it himself

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1. Lipstein, at 188.

2. The article commences at 157 but the portion of relevance here is 183-8.

he is held to give an implied mandate to his subjects to do what is necessary for the maintenance of law and order rather than expose them to all the disorders of anarchy:..."<sup>1</sup>

If this judgment is read in its context, that of the Southern Rhodesian situation, and if this excerpt is read in the context of the whole judgment, there is nothing in either that deviates from the generally accepted approach in the cases about Southern Rhodesia. Indeed, the quotation is preceded by a long discussion of whether or not it is implicit in the conduct of the lawful government of Southern Rhodesia, the British Government, that they wish the courts in that colony to continue to apply the law - the conclusion is that it was.

Lord Denning cannot suggest, with any justification, that his new approach in Hesperides Hotels was in any way foreshadowed in his judgment in James and his fourth and final authority, the general approval of his observations on necessity in James by Scarman, L.J.<sup>2</sup> in that same case and the remark of Scarman, L.J. that:

"I do think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government."<sup>3</sup>

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1. In re James, at 62 quoted in Hesperides Hotels, at 663.

2. At 70.

3. In re James, at 70 quoted in Hesperides Hotels, at 663.

cannot be construed as providing any support for Lord Denning's new approach in Hesperides Hotels. That there has been a fundamental change in Lord Denning's views of the law on this matter is well illustrated in the change in his approach to the relevance of the attitude of the lawful government to the laws and acts of officials of the unrecognised government. In James he considers this matter at length and is clearly of the view that in the Southern Rhodesia situation there is positive evidence of the mandate required for the operation of the doctrine of necessity. He, however, goes on to say that even if the evidence does not support express mandate, the required mandate is to be implied, presumably in the absence of sufficient evidence to the contrary.<sup>1</sup> However his investigations in his judgment in Hesperides Hotels into the current situation as regards the government of Cyprus<sup>2</sup> is not directed at ascertaining the attitude of the recognised government to the unrecognised government but is undertaken, it would seem, for the purpose of ascertaining whether the Government of the North "is in effective control or not"<sup>3</sup> - The attitude of the lawful government has become irrelevant.

Although this judgment of Lord Denning<sup>2</sup> is of poor quality, the basic approach he adopts is not without merit. The other approach in its

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1. At 62.

2. At 663 et seq.

3. Lord Denning in Hesperides Hotels at 663.



primitive form, or in the more sophisticated form it has taken in the cases on Southern Rhodesia, gives precedence to state interests over the interests of the individuals concerned. As we have seen<sup>1</sup> this has been criticised as being inappropriate in cases involving private international law, a branch of private law. Lord Denning made this point in Hesperides Hotels taking as his starting point the often expressed view that the executive and the courts should speak with one voice on this matter of recognition. He said,

"But there are those who do not subscribe to this view. They say that there is no need for the executive and the judiciary to speak in unison. The executive is concerned with the external consequences of recognition, vis-à-vis other states. The courts are concerned with the internal consequences of it, vis-à-vis private individuals."<sup>2</sup>

The approach adopted in the cases on Southern Rhodesia, perhaps we may call it the sophisticated sovereignty approach, means that no recognition can be given to the laws and acts of an unrecognised government unless this is possible under the laws of the recognised government. In some cases it will be possible to give effect to such laws and acts and we have noted three situations where this is possible: where the recognised government has set up the unrecognised government,

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1. At pp. 163 - 164.

2. At 662.

where the recognised government has provided by legislation for effect to be given to the laws and acts of the unrecognised government, and where the doctrine of necessity is part of the legal system of the recognised government. However cases will still arise where the application of this sophisticated sovereignty approach will not enable the laws of an unrecognised government to be applied in circumstances where the court feels that they should be applied. Unless the court solves this problem by using the public policy doctrine, what is it to do?<sup>1</sup> On the other hand Lord Denning's approach, although safeguarding the interests of the individuals concerned, takes no account whatever of the state or international interests involved in the matter. The point surely is that, in this field of the enforcement of the laws of unrecognised governments, state and international interests legitimately intrude, even where the matter in issue involves private rights. Both the Denning approach and the sophisticated sovereignty approach err in that they take extreme positions; what is needed is a flexible approach that allows the due weight, appropriate in the particular case in question, to be given to both state and private interests. This could also perhaps be realised by subdividing the field, that is, by adopting different approaches to

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1. See the penultimate line of the quotation from the judgment of Lord Pearce in Madzimbamuto set out at p. 174.

different situations falling within the general field. The three categories set out earlier in this chapter at p.189 , could be relevant in this regard. Then, again, the two approaches could be combined. My conclusion then is that, <sup>here</sup> as in some many other fields of conflict of laws, notably contract and delict, the traditional approach has been defective in that the rules have been too inflexible and the juridical categories too broad.

I would suggest that where a court is continuing to operate in territory under the effective control of a rebel government then it must apply the laws of that government. Where the rebellion has not yet succeeded, the court should, if this is a practical proposition, only apply such laws as are necessary to the maintenance of law and order - a cynic may view this as an "investment" lest the revolution fail. This is basically the approach set out in Madzimbamuto though here, I would suggest, the application of rebel laws should not necessarily be dependent on the implied mandate of the lawful sovereign, although, if the decision to apply rebel laws can be based on implied mandate, this further safeguards the judge should the rebellion ultimately fail.

Where the court is operating not in rebel territory but in the territory of the lawful government then, I would suggest, it should only give such recognition to the laws and administrative acts of the rebel government as its own government considers appropriate. Where the lawful government has legislated specifically on the matter, then there is no problem,



provided the case in question falls within the field of the legislation. Where the legal system of the lawful government recognises some doctrine like that of implied mandate, then that too can be applied. If this leads to results that the lawful government does not like, either because rebels laws are being enforced or because they are not, it can always deal with the matter by legislation. In this context, that is, where the court in question is that of the lawful government, it would seem inappropriate for the court to adopt a Denning type approach in which the attitude of the lawful government is considered irrelevant.

In the third situation, the position where there is a real conflict of laws problemz, Lord Denning's approach is more relevant. Here the court in question operates not within the rebel territory nor within that, if any, controlled by the previous government, but within the territory of another state which recognises this latter government. This is the situation that existed in Bilang and also in Hesperides Hotels. In this situation the approach of Lord Denning in Hesperides Hotels may be thought appropriate. Here the lawful government is not that of the country of the court so there is not this compelling reason to allow enforcement of rebel laws only insofar as they are enforceable under the system of the lawful government. But some concession is made in this approach to the fact that the rebel government is not recognised for only its laws essential to the maintenance of law and order or to the continuance of ordered living are to be applied.

The question arises: does this approach give sufficient weight to State interests? What if the recognised government wishes to impose a legal as well as an economic blockade and the government of the country of the forum is sympathetic to this? The answer may be that, in these circumstances, the government should act by passing appropriate legislation. This seems a more viable proposition than the alternative of the courts adopting the sophisticated sovereignty approach and the government legislating where this creates undesirable results. One reason for this is that Parliament is unlikely to legislate unless the matter is of substantial national importance and the fact that a few foreigners are not getting justice in our courts because a rebel government's laws cannot be enforced is hardly likely to produce corrective legislation. It is true such legislation, if only partial in application, has been passed in relation to Southern Rhodesia but the circumstances there were unusual in that one of the United Kingdom's own colonies was involved.

The second matter which remains for consideration is the position as regards the Transkei. In 1976 South Africa purported to grant independence to a part of its territory known as the Transkei but no member of the United Nations save South Africa has recognised the new State or its government.<sup>1</sup> The United Kingdom considers the Transkei still to be part of South Africa and thus falling under the authority

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1. A further South African Bantustan, Bophuthatswana, was declared independent on the 6th December 1977. At this date it was announced that it had been recognised only by South Africa and the Transkei. Press reports state that Rhodesia offered recognition but that this offer was not favourably received.

of the South African government. Here we would again appear to have the kind of situation that arose in the Carl Zeiss case. There it will be remembered, it was argued that, as the United Kingdom government had not recognised the East German government, the latter's acts could not be enforced. This argument was rejected, it being held that although the United Kingdom recognised the Soviet Union and not the East German government as the governing authority in East Germany, the acts of this latter government would be given effect in the United Kingdom "... because they are acts done by a subordinate body which the U.S.S.R. set up to act on its behalf."<sup>1</sup>

This presumably, is the correct approach to adopt in respect of the Transkei though there has been no case, as yet, on the point to my knowledge. The enactments of its legislature and the acts of its officials, such as decrees granted by its judicial officers, will be recognised by our courts as being instances of the exercise of authority delegated by the recognised government, that is, that of South Africa.

I presume, however, that our courts will only recognise such exercises of authority by the Transkeian government and its officials as are consistent with their basis in delegated authority: acts that

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1. See this chapter at p. 160.



involve express or implied claims of independent sovereignty for the Transkeian government will not be recognised. This seems a necessary limitation in these cases of unacceptable regimes set up within part of a territory under their control by recognised governments although I have not found any authority in the cases to support it.

It seems most likely that the Scottish courts, if faced with this problem of the laws and acts of unrecognised governments, would follow these cases on English law. There seems, indeed, to be a dearth of authority on this topic in Scots law; the only authority from this system cited in these cases is Hume on necessity in the field of criminal law. It is interesting to note that Stair in his Apology has this to say of his appointment and service as a judge under the Protectorate:

"To show how little I have been a changeling or time-server, it is commonly known, and there are hundreds can witness, that I was excluded from the Bar for not taking the Usurper's tender, engaging to be faithful to the Commonwealth of England without King or House of Lords, and never appeared again until that tender was laid aside; and though thereafter I was made a Judge, supposing I would be as acceptable to the nation as any, yet I did not embrace it, without the approbation of the most eminent of our ministers that were then alive, who did wisely and justly distinguish between the commissions granted by usurpers, which did relate only to the people, and which were no less necessary, than if they had prohibited baking or brewing but by their warrant, and between these which relate to councils for establishing the usurped power or burdening the people; and therefore, though I was much invited, I never embraced a commission to any of their pretended Parliaments or Councils of State; and I know that the King allowed his friends to accept such commissions as were necessary for preserving his people, and therefore, when he was restored, I was one of the Senators of the College of Justice in the first nomination."

A note on Hesperides Hotels

This case has now come before the House of Lords - see [1978] 2 All E.R. 1168 (H.L.(E)).

The House of Lords did not go into the question of laws and acts of unrecognised governments which was dealt with by Lord Denning in the Court of Appeal. It was held, however, that the ruling that the court had no jurisdiction in the matter, which was based on the rule in the Mozambique case, did not apply to the claim for conspiracy to effect trespasses to the contents of the hotels and that the action could proceed in this respect.